IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1866

PAUL BOSWELL, LUNCEFORD G. BOSWELL, A. JAMES ELLIOTT, RONALD L. REID, MRS. LYNN P. COCHRAN, B. HARVEY HILL, JR., ROBERT W. HURST, ROBERT L. STEED, CARL H. COFER, ROBERT S. BEAUCHAMP, PEYTON S. HAWES, JR., MARK J. LEVICK, CHARLES L. SCHREEDER, THE SURRO CORPORATION, JIM DODSON, PATRICIA W. WOMACK, and MILDRED WARD HILSMAN, as Executrix under the will of J. C. HILSMAN,

Petitioners,

v.

GEORGIA POWER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(Counsel Listed On Inside Cover)

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 3

QUESTIONS PRESENTED 3

STATUTES INVOLVED 4

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT:

1. Introduction 9
2. This Court Has Previously Expressly Reserved Opinion on The Question of Whether State Law or a Federal Common Law Should Control in Condemnation Actions Brought by a Licensee Under Section 21 of The Federal Power Act .. 10
3. The Decision of the Fifth Circuit Court of Appeals Here is in Conflict with Decisions of Courts of Appeals of the Fourth, Eighth, and Ninth Circuits 11
4. The Decision of the Fifth Circuit Court of Appeals Here, Which Requires the Development and Application of a Federal Common Law, is in Direct Conflict With the Choice of Law Principles Developed by this Court in *Bank of America* v. *Parnell*, 352 U.S. 29 (1956) and its Progeny 12

CONCLUSION 16

TABLE OF CITATIONS

CASES:

Bank of America v. *Parnell*, 352 U.S. 29 (1956) 7, 9, 13, 14, 15

Clearfield Trust Co. v. *United States*, 318 U.S. 363 (1945) 7, 8, 9, 13, 14, 15

Department of Transportation v. *Doss*, 238 Ga. 480, 233 S.E.2d 144 (1977) 6 n.2

Page

Erie R.R. v. *Thompkins*, 304 U.S. 64 (1938) 15
Feltz v. *Central Nebraska Public Power and Irrigation District*, 124 F.2d 378 (8th Cir. 1942) 11
Georgia Power Co. v. *54.20 Acres of Land*, 563 F.2d 1178 (5th Cir. 1977), Rehearing Denied 570 F.2d 1391 (5th Cir. 1978) 2
Grand River Dam Authority v. *Grand-Hydro*, 335 U.S. 359 (1948) 10
Hard v. *Housing Authority*, 219 Ga. 74, 132 S.E.2d 25 (1963) 6 n.2
Miree v. *DeKalb County*, 433 U.S. 25 (1977) 7, 8, 9, 10, 13, 15
Oakland Club v. *South Carolina Public Service Authority*, 110 F.2d 84 (4th Cir. 1940) 11
Public Utility District No. 1 v. *Seattle*, 382 F.2d 666 (9th Cir. 1967) 12
United States v. *Little Lake Misere Land Co.*, 412 U.S. 580 (1973) 7, 13 n.3
United States v. *Standard Oil Co.*, 332 U.S. 301 (1947) 7, 13, 14
United States v. *Yazell*, 382 U.S. 341 (1966) 7, 9, 13, 14
Wallis v. *Pan American Petroleum Corp.*, 384 U.S. 63 (1966) 7, 8, 9, 13
White v. *Georgia Power Co.*, 237 Ga. 341, 227 S.E.2d 385 (1976) 6 n.2

STATUTES:

Natural Gas Act, 15 U.S.C. § 717f (h) (1976) 5 n.1, 10
Federal Power Act,
16 U.S.C. §§ 791a, et seq. (1974) 5
16 U.S.C. § 814 (1974) 4, 5
28 U.S.C. § 1254(1) (1970) 3
28 U.S.C. § 1292(b) (1970) 2
Rules of Decision Act, 28 U.S.C. § 1652 (1970) 4, 7
28 U.S.C. § 2101(c) (1970) 3

MISCELLANEOUS:

Federal Rules of Civil Procedure, Rule 71A(h) 6
Georgia Code Ann. § 36-504 (1970) 6 n.2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

PAUL BOSWELL, LUNCEFORD G. BOSWELL, A. JAMES ELLIOTT, RONALD L. REID, MRS. LYNN P. COCHRAN, B. HARVEY HILL, JR., ROBERT W. HURST, ROBERT L. STEED, CARL H. COFER, ROBERT S. BEAUCHAMP, PEYTON S. HAWES, JR., MARK J. LEVICK, CHARLES L. SCHREEDER, THE SURRO CORPORATION, JIM DODSON, PATRICIA W. WOMACK, and MILDRED WARD HILSMAN, as Executrix under the will of J. C. HILSMAN,

Petitioners,

v.

GEORGIA POWER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners hereinabove named pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on November 28, 1977.

OPINIONS BELOW

The opinion of the court of appeals is reported *sub nom. Georgia Power Company v. 54.20 Acres of Land,* 563 F.2d 1178 (5th Cir. 1977) (rehearing en banc denied March 31, 1978, at 570 F.2d 1391). The opinion, judgments, and notice of order denying rehearing at pages 1a, 47a, 48a, and 49a, respectively, of the appendix.

The proceedings in the United States District Court for the Middle District of Georgia consisted of two separate civil actions and resulted in two separate appeals—cases 75-4448 and 77-1327 in the court of appeals. Since the two appeals were combined for the purpose of argument and decision in the court of appeals, a joint petition for certiorari is here made.

The first proceeding in the district court, Civil Action 74-171-MAC, involved only two petitioners, JIM DODSON and PATRICIA W. WOMACK. That case proceeded to trial in the district court, and the final judgment in that case appears at page 50a of the appendix. The appeal in that case (No. 75-4448) involves the instructions given the commission as to the measure of just compensation, which instructions were set forth in the order of the district court entered on February 13, 1975, and amended on April 30, 1975. The pertinent portions of the order giving instructions and the amendment thereto appear at pages 52a and 65a, respectively, of the appendix.

The remaining petitioners were involved in the second proceeding in the district court, Civil Action 75-55-ATH. The interlocutory appeal in that case (No. 77-1327) was taken under 28 U.S.C. § 1292(b)(1970) from the order of the district court overruling petitioners' objections to the same instructions on the measure

of just compensation which had been given in the earlier district court action. The order applying the contested instructions, the pertinent portions of the order overruling petitioners' objections thereto, and the certification for immediate review appear at pages 73a, 75a, and 77a, respectively, of the appendix.

None of the proceedings in the district court has been reported.

JURISDICTION

The judgments of the court of appeals sought to be reviewed were dated and entered on November 28, 1977 (appendix, pp. 47a-48a).

Petitioners' motion for rehearing en banc was denied by order dated and entered March 31, 1978 (appendix, p. 49a).

This petition for certiorari is being filed within the time allowed by 28 U.S.C. § 2101(c)(1970). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1)(1970).

QUESTIONS PRESENTED

1. When a privately owned state utility company in its capacity as a licensee of the Federal Power Commission exercises the power of eminent domain as authorized by Section 21 of the Federal Power Act to condemn property located wholly within the state for a local hydroelectric project, should the rules of valuation of the forum state be applied to determine just compensation, or is there such an overriding federal interest in nation-wide uniformity of valuation in condemnation actions by Federal Power Commission licensees as to require the displacement of state rules of valuation and the application of a federal common law under Section 21 of the Federal Power Act?

2. When a privately owned state utility company, which regularly exercises its state power of eminent domain under state law, condemns property for a local hydroelectric project in the federal courts as authorized by Section 21 of the Federal Power Act, can the rules of valuation of the forum state be held to so frustrate or hinder the policy of the Federal Power Act as to require total displacement of the state law in favor of a nation-wide federal common law of valuation to be applied under Section 21 of the Federal Power Act?

STATUTES INVOLVED

The "Rules of Decision Act", 28 U.S.C. § 1652 (1970) provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Section 21 of the Federal Power Act, 16 U.S.C. § 814 (1970) provides:

> When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which

> such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.[1]

STATEMENT OF THE CASE

Georgia Power Company is a privately owned Georgia utility corporation. It intends to operate a hydroelectric power generating facility primarily for its Georgia customers with a dam across the Oconee River in Georgia. The dam will produce a reservoir known as Lake Wallace which will be located completely within the State of Georgia. Petitioners are Georgia landowners whose property will be inundated by Lake Wallace.

The Federal Power Commission issued a license to Georgia Power for the Lake Wallace project under the Federal Power Act, 16 U.S.C. § 791a, et seq. (1970), Georgia Power then instituted condemnation proceedings against petitioners' lands in the United States District Court for the Middle District of Georgia. The jurisdiction of the district court was invoked under Section 21 of the Federal Power Act, 16 U.S.C. § 814 (1970).

---

[1] Section 7(h) of the Natural Gas Act, 15 U.S.C. § 717f(h) (1970), contains substantially identical language, but is not directly involved in this case.

The district court appointed a three-man commission under Rule 71A of the Federal Rules of Civil Procedure to conduct hearings and make awards in accordance with detailed instructions promulgated by the court. The instructions, which were formulated from an array of about thirty federal cases, basically instructed the commission to determine just compensation in accordance with rules of valuation established by Congress and the federal courts for eminent domain actions by the United States under statutes other than the Federal Power Act. Appendix, pp. 52a, 65a. The rules of valuation as thus developed by the district court differ substantially, however, from the substantive laws of Georgia regarding just compensation.[2]

Civil Action 74-171-MAC went to final judgment, and based on the court's instructions to the commissioners, resulted in an award of zero dollars to the landowners—a result legally impossible under Georgia law (appendix, p. 50a). That judgment was appealed to the United States Court of Appeals for the Fifth Circuit in 1975. In Civil Action 75-55-ATH an interlocutory appeal was taken to the United States Court of Appeals for the Fifth Circuit from the order overruling petitioners' objections to the same instructions (appendix, p. 75a). The cases were consolidated for the purposes of oral argument and decision in the Court of Appeals.

[2] The instructions required the commission, in the case of a partial taking, to reduce the award for land actually taken by the value of any consequential benefit found to inure to any remainder parcel on account of the taking (appendix, p. 62a); *Ga. Code Ann.* § 36-504 (1970) does not allow such an offset. The instructions prohibited the commissioners from considering any enhancement in value of the land taken attributable to the project (appendix, p. 61a); Georgia law allows consideration of such benefits. *Hard v. Housing Authority*, 219 Ga. 74, 132 S.E.2d 25 (1963). The instructions prohibited consideration of the landowner's expenses of litigation (appendix, p. 64a); Georgia law allows compensation for such expenses. *White v. Georgia Power Company*, 237 Ga. 341, 227 S.E.2d 385 (1976); *Department of Transportation v. Doss*, 238 Ga. 480, 233 S.E.2d 144 (1977).

In a sharply split panel decision, the Court of Appeals affirmed the rulings of the district court. In the majority panel opinion, Judge Wisdom started from the premise that, despite the Rules of Decision Act, 28 U.S.C. § 1652 (1970), federal courts should always apply federal rules of valuation in condemnation actions "unless there are circumstances unique to a federal condemnation under Section 21 which require the opposite result." Appendix, p. 15a. In determining whether circumstances here require the application of state law, the majority reviewed the line of Supreme Court cases dealing with the question of when a federal common law may be formulated and found that "[t]hat review reveals a changing emphasis of factors and shifting preferences for one law or the other." Appendix, p. 20a. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *United States v. Standard Oil Co.*, 332 U.S. 301 (1947); *Bank of America v. Parnell*, 352 U.S. 29 (1956); *United States v. Yazell*, 382 U.S. 341 (1966); *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973); *Miree v. DeKalb County*, 433 U.S. 25 (1977). From this line of cases, the majority opinion developed a "balancing test" between "the federal interest in carrying out a program in the most efficient and effective manner possible" and the "state's interest in the preservation of its control over local interests . . . and in preventing displacement

of state law." Appendix, pp. 21a-22a. Applying the "balancing test", the majority found the balance to be tipped in favor of the application of a federal common law essentially because "the use of state law could interfere with achievement of congressional aims" by possibly increasing the cost of the project to Georgia Power Company. Appendix, pp. 23a-26a.

In a sharply worded dissent, Judge Simpson analyzed the Supreme Court decisions articulating the considerations to be made in deciding when and how to make a choice of law and discussed two points on which the majority opinion is in error. Initially, Judge Simpson disagrees with the proposition that the rules governing choice of law are somehow different in the context of eminent domain actions. Appendix, p. 35a. Secondly, he points out that there is no evidence or data in the record here indicating whether or how any substantial interest of the United States would be adversely affected by the application of state law under Section 21 of the Federal Power Act and suggests that the majority's concern for speculative and attenuated national interests which tipped the balance here toward the need for a federal law is precisely the same type of misplaced concern which caused the Supreme Court to reverse the Fifth Circuit in *Wallis* and *Miree*. Appendix, pp. 41a-43a. Quoting *Miree v. DeKalb County, supra,* that "the application of federal common law to resolve the issue presented in this case would promote no federal interest even approaching the magnitude of those found in *Clearfield*", Judge Simpson concluded that there is no significant conflict between state law and the broad goals of the Federal Power Act and that Georgia law should be applied. Appendix, p. 46a.

Petitioners' subsequent application for rehearing en banc was denied by the court of appeals, and petitioners now seek review of the majority panel decision, contending that the choice of law principles articulated by the Supreme Court in *Parnell, Wallis, Yazell* and *Miree* demand that state law be applied by federal courts in every case unless "a uniform national rule is necessary to further the interests of the federal government." *Miree v. DeKalb County, supra,* at 29. Since no such need for nation-wide uniformity is evident in this case, or in any condemnation action under Section 21 of the Federal Power Act, petitioners contend that the majority decision of the Court of Appeals is in error.

REASONS FOR GRANTING THE WRIT

1. Introduction.

This case involves the important question of when federal courts may develop and apply a federal common law, and specifically whether just compensation in condemnation actions by a private licensee under Section 21 of the Federal Power Act will be determined in accordance with the law of the forum state or a federal common law of valuation. The resolution of this question is crucial to the development of the choice of law principles which have been articulated by the Supreme Court in the line of cases beginning with *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943) and continuing most recently in *Miree v. DeKalb County,* 433 U.S. 25 (1977). For the reasons set forth below, petitioners submit that this case and the concepts involved are sufficiently special and important to warrant review on writ of certiorari.

2. This Court Has Previously Expressly Reserved Opinion on the Question of Whether State Law or a Federal Common Law Should Control in Condemnation Actions Brought by a Licensee Under Section 21 of the Federal Power Act.

In *Grand River Dam Authority v. Grand-Hydro,* 335 U.S. 359 (1948), this Court affirmed the judgment of the Supreme Court of Oklahoma, which applied state rules of compensation in a state court proceeding by a Federal Power Commission licensee, but expressly reserved opinion on the issue presented by this petition:

> Accordingly, we express no opinion upon what would be the appropriate measure of value in a condemnation action brought by the United States or by one of its licensees in reliance upon rights derived under the Federal Power Act.

335 U.S. at 373. This issue has not been addressed since that time by this Court and is an important question of federal law which has not been, but should be, settled by this Court.

It should be noted that the decision of the court of appeals here not only establishes for the first time a federal common law of valuation to be applied under Section 21 of the Federal Power Act, but will also be authority for application of the same federal common law under the identical provisions of Section 7(h) of the Natural Gas Act, 15 U.S.C. § 717f(h) (1970). Thus, while recognizing that "the Supreme Court has demonstrated a growing desire to minimize displacement of state law" citing *Miree v. DeKalb County, supra* (appendix, p. 22a), the Fifth Circuit has undertaken to expand the application of federal common law to all cases in every state involving condemnations by private licensees under both the Federal Power and Natural Gas Acts.

Petitioners submit that the question expressly reserved in *Grand River Dam Authority* is squarely presented in this case and, in light of the nation-wide effect of the decision of the court of appeals here, should be decided by the Court at this time.

3. The Decision of the Fifth Circuit Court of Appeals Here Is in Conflict With Decisions of Courts of Appeals of the Fourth, Eighth and Ninth Circuits.

The decision of the court of appeals here directly conflicts with at least seven decisions of the Court of Appeals for the Eighth Circuit. The Eighth Circuit decisions, headed by *Feltz v. Central Nebraska Public Power and Irrigation District,* 124 F.2d 378 (8th Cir. 1942), and listed in footnote 18 of the majority opinion of the court of appeals (appendix, p. 11a), expressly hold that the substantive laws of the forum state apply in actions under Section 21 of the Federal Power Act. The majority opinion of the Fifth Circuit dismisses this line of cases because of "the absence of any reasoned discussion." Appendix, pp. 11a-12a.

The decision of the court of appeals is contrary to *Oakland Club v. South Carolina Public Service Authority,* 110 F.2d 84 (4th Cir. 1940), which the majority opinion held is "not on point" (appendix, p. 12a) even though the Court of Appeals for the Fourth Circuit in that opinion quoted and specifically approved the following language from the order of the South Carolina district court:

> I construe Section 21 of the Federal Power Act not as an exclusive law of eminent domain, . . . but as complementary to the State law, and as enabling the holder of a Federal Power license to exercise in the Federal courts, as the defendant is doing, the substantive rights of eminent domain granted to it under the State law.

110 F.2d at 86.

The decision of the court of appeals is also contrary to *Public Utility District No. 1 v. Seattle,* 382 F.2d 666 (9th Cir. 1967), where the Court of Appeals for the Ninth Circuit held that Section 21 of the Federal Power Act does not delegate the full eminent domain power of the United States to a Federal Power Commission licensee. 382 F.2d at 669-70.

4. The Decision of the Fifth Circuit Court of Appeals Here, Which Requires the Development and Application of a Federal Common Law, Is in Direct Conflict With the Choice of Law Principles Developed by This Court in *Bank of America v. Parnell,* 352 U.S. 29 (1956) and Its Progeny.

More broadly, the decision of the court of appeals construing Section 21 of the Federal Power Act as requiring the formulation and application of an independent federal common law to be applied instead of state substantive law appears to conflict directly with the rationale of all of the previous decisions of this Court on the choice of law question. Particularly, the "balancing test" formulated by the court of appeals to reach the specific result here does not include in its equation many of the important factors which the Supreme Court has considered in developing the principles controlling choice of law in federal courts. Petitioners submit that this broad pronouncement by the Fifth Circuit will have general impact beyond the confines of the Federal Power Act (and the Natural Gas Act), and for that reason the "balancing test" should be reviewed by this Court.

Specifically, the "balancing test" does not call for inquiry into whether any substantial rights or duties of the United States would be subjected to "exceptional uncertainty" by the application of state law. *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943); *Bank of America v. Parnell,* 352 U.S. 29 (1956); *Miree v. DeKalb County,* 433 U.S. 25 (1977). Nor does the "balancing test" take into account the guiding principle that, in deciding whether a federal common law should be fashioned, "a *significant conflict* between some federal policy or interest and the use of state law in the premises must first be specifically shown." *Wallis v. Pan American Petroleum Corp.,* 384 U.S. 63 (1966) (emphasis added); *Miree v. DeKalb County, supra.*

Most importantly, the "balancing test" overlooks the fundamental proposition that not even the United States government itself can claim the benefit of federal common law rules unless the federal program or interest to be protected is and must be "uniform in character throughout the Nation." *United States v. Yazell,* 382 U.S. 341 (1966). In those cases where state law has been pre-empted in favor of a federal common law, the decisions have turned specifically on the need for nationwide uniformity to further the interests of the federal government and to eliminate the diverse results and uncertainty accompanying application of individual state laws. *United States v. Standard Oil Co.,* 332 U.S. 301 (1974); *Clearfield Trust Co. v. United States, supra.*[3]

---

[3] The majority panel opinion also cites *United States v. Little Lake Misere Land Co.,* 412 U.S. 580 (1973) which contains a valuable discussion of the *Erie-Clearfield* line of cases and the considerations which must be made before state law can be abandoned in favor of a federal common law. In *Little Lake,* however, the Supreme Court found it unnecessary to formulate an independent "common law" rule, but rather simply refused to be bound by a

The "balancing test" formulated by the majority panel opinion of the court of appeals here, however, turns, not on some perceived requirement for nation-wide uniformity, but on whether the application of a federal common law will result in a lower project cost to Georgia Power Company than would the application of Georgia law. In so holding, the majority opinion has failed to note that in both *Clearfield* and *Parnell* the Supreme Court approached the choice of law problem without regard to whether state law favored the plaintiff or the defendant, or to the purpose of the law. Rather, the key was whether uniformity was or was not required. Significantly, in *Standard Oil,* the need for nation-wide uniformity resulted in the application of a federal common law even though the effect was to bar recovery by the United States for injuries to a soldier. Likewise, in *Yazell,* where no nation-wide interest was found sufficient to warrant the application of a federal common law, state law was applied even though it had the effect of barring recovery of a debt owed to the United States.

---

specific Louisiana statute which the Court found was plainly and directly hostile to the interests of the United States. While noting that in many situations, rights, interests, and legal relations of the United States are determined by application of state law, "specific aberrant or hostile state rules do not provide appropriate standards for federal law." 412 U.S. at 595-596. Thus, *Little Lake* essentially holds that, under the supremacy clause of the Constitution, a federal program cannot be specifically frustrated by contradictory state law—*Little Lake* did not hold that a federal common law could be developed to promote a federal program or policy where state law is otherwise adequate and suitable. It has never been contended that the Georgia law of valuation is too "aberrant or hostile" to be adopted as the rule of decision in condemnation actions under the Federal Power Act.

It is also important to realize that this case marks the first time since *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938) that a federal common law has been applied in litigation involving purely private parties and to which the United States is not a party. In *Parnell,* the Supreme Court found that since the litigation was "purely between private parties and [did] not touch the rights and duties of the United States," there was no compelling reason to apply a federal common law in that case. 352 U.S. at 33. In *Miree,* the Court noted that since the claims asserted there "will have no direct effect upon the United States or its Treasury" and "[s]ince only the rights of private litigants are at issue here, we find the *Clearfield Trust* rationale inapplicable." 433 U.S. at 29-30. As pointed out in the concurring opinion of Mr. Chief Justice Burger in *Miree,* a federal common law should be applied to the rights of private citizens only in those situations " 'where the rights and obligations of private parties are so dependent on a specific exercise of congressional regulatory power that' "the Constitution or Acts of Congress 'require' otherwise than that state law govern of its own force." ' " 433 U.S. at 34.

Petitioners submit that the "balancing test" devised by the majority panel opinion in the court of appeals does not appear to comport in any respect with the previous decisions of the Supreme Court on the choice of law question. The formulation of such a "balancing test" in this important area of federal-state relationships should be reviewed by the Supreme Court to correct the errors therein which will have a broad effect far beyond the scope of this particular case.

CONCLUSION

The decision below is contrary to established precedent in decisions of other courts of appeals on an important federal question, as to which this Court has previously expressly reserved decision. It is contrary to the rationale of a number of decisions of this Court concerning choice of law in private litigation not substantially affecting rights or duties of the United States. It is respectfully submitted that the petition for certiorari should be granted so that this Court may settle this important federal question.

W. DAN GREER

Of Counsel:

HEYMAN AND SIZEMORE
Third Floor, Fulton Federal Building
Atlanta, Georgia 30303

JAMES H. ROLLINS

Of Counsel:

COFER, BEAUCHAMP & HAWES
Suite 200
Peachtree & Broad Building
Atlanta, Georgia 30503

GEORGE D. LAWRENCE, JR.

Of Counsel:

LAWRENCE, RICE & LAWRENCE
P. O. Box 89
Eatonton, Georgia 31024

DENMARK GROOVER, JR.

Of Counsel:

BYRD, GROOVER & BUFORD
P. O. Box 755
Macon, Georgia 31202

Attorneys for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

GEORGIA POWER COMPANY, Plaintiff-Appellee,

v.

54.20 ACRES OF LAND, situated lying and being LAND LOTS 315 AND 326 OF the 3RD LAND DISTRICT, etc., et al., Defendants,

JIM DODSON and PATRICIA W. WOMACK, Defendants-Appellants.

J. C. HILLSMAN et al., Plaintiffs-Appellants,

v.

GEORGIA POWER COMPANY, Defendant-Appellee.

Nos. 75-4448 and 77-1327.

Nov. 28, 1977.

Appeals from the United States District Court for the Middle District of Georgia.

Before WISDOM, SIMPSON, and TJOFLAT, Circuit Judges.

WISDOM, Circuit Judge:

These condemnation cases present the issue whether compensation should be determined under federal law or under the law of the state where the condemned property is located when a licensee of the Federal Power Commission exercises the power of eminent domain in federal court as authorized by Section 21 of the Federal Power Act, 16 U.S.C. § 814 (1970). We reserved this question in *Louisiana v. Lindsey,* 5 Cir. 1975, 524 F.2d 934, as did the Supreme Court in *Grand River Dam Authority v. Grand-Hydro, Inc.,* 1948, 335 U.S. 359, 69 S.Ct. 114, 93 L.Ed. 64. We now hold that federal law controls.

I.

The plaintiff-appellee, Georgia Power Company, is a privately owned Georgia utility. It intends to operate a

hydroelectric power generating facility with a dam across the Oconee River in Hancock and Putnam Counties, Georgia, at a point known as Laurens Shoals. The dam will produce a lake to be known as Lake Wallace. The appellants are Georgia landowners with property which will be inundated by Lake Wallace.[1]

Under the Federal Power Act, 16 U.S.C. §§ 791a, et seq. (1970), the Federal Power Commission may issue licenses to certain persons or entities to construct, operate, or maintain various hydroelectric generating facilities. 16 U.S.C. § 797(e). The F.P.C. issued a license to Georgia Power on August 6, 1969, for the Lake Wallace Project.[2] As a licensee, Georgia Power may exercise the right of eminent domain under Section 21 of the Federal Power Act, 16 U.S.C. § 814 (1970), which provides:

> When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoid, diversion structure, or the works appurtenant or accessory thereto . . . it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall

[1] The numerous appellants in this consolidated appeal fell into three groups for briefing purposes. In addition, Mrs. Nellie W. Larman, another landowner involved in a Lake Wallace Condemnation proceeding, filed an amicus brief. Because each appellant's argument, if successful, would benefit the appellants as a group, we generally have not identified the particular party advancing an argument discussed in this opinion.

[2] 42 F.P.C. 356 (1969). At that time, the project was known as the Laurens Shoals Project and the license is issued in that name.

> conform as nearly as may be with the practice and procedure in the courts of the State where the property is situated: *Provided,* That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

Exercising this right, Georgie Power brought actions in the District Court for the Middle District of Georgia. Senior Judge W. A. Bootle apopinted a three-member Commission, *see* Fed.R.Civ.Proc. 71A, to determine the amount of compensation due the condemnees. In his instructions to the Commissioners, Judge Bootle set out the federal law of compensation. These rules differ from Georgia law. Instruction No. 20 directs the Commissioners to ignore an increase in value which the Georgia Power project has created in the condemned property; a Georgia court might recognize such value. *See Hard v. Housing Authority,* Ga.1963, 219 Ga. 74, 132 S.E.2d 25. Instruction No. 21 allows the Commissioners to offset any recovery for land actually taken with benefits to any remaining property caused by the project; Georgia law prohibits such a set-off. *See* Ga.Code Ann. § 36-504 (1970). The district court declined to instruct the Commissioners to include a reasonable attorneys' fee in their award; in a Georgia proceeding a reasonable attorneys' fee would be allowed. *See White v. Georgia Power Company,* Ga.1976, 237 Ga. 341, 227 S.E.2d 385.

After these instructions were first made in 1975 several condemnees in cases other than No. 75-4448 filed motions and objections opposing the use of federal law. The district court held a pre-trial hearing on the objections. Judge Bootle made several changes in the phrasing of his instructions, but he regarded federal law as controlling.[3]

[3] After the hearing, Judge Bootle provided a Memorandum to Counsel citing cases supporting his conclusion that federal law of compensation applies. Those cases are *Clearfield Trust Co. v.*

The Commission then heard evidence in No. 75-4448. Its report concluded that the benefits accruing to the land remaining with the landowners exceeded the value of the property taken. As a result, the Commission awarded no monetary compensation. The landowners opposed Georgia Power's motion to confirm the report on the ground that the offset of benefits was improper. The court overruled these objections and the condemnees appealed.[4]

No. 77-1327 began after Judge Bootle's decision in No. 75-4448 to apply federal law. The condemnees in No. 77-1327 nevertheless moved that the court incorporate Georgia law into its instructions.[5] The judge conducted a pretrial conference and heard argument on the question. He then denied the motion and adhered to his previous order that federal law applies. Judge Bootle certified the question for immediate review under 28 U.S.C. § 1292(b) (1970). This Court allowed the appeal, and consolidated it with No. 75-4448.

II.

Before a federal court may reach the question of applying state or federal common law to an issue before it, the court must determine that the source of the right or authority in question is federal. If the source is not federal,

---

United States, 1943, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838; *United States v. County of Allegheny,* 1944, 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209; *United States v. Standard Oil Co.,* 1947, 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067; *United States v. Yazell,* 1966, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404; *Duvall-Wheeler Livestock v. United States,* 5 Cir. 1969, 415 F.2d 226; *United States v. McCleskey Mills, Inc.,* 5 Cir. 1969, 409 F.2d 1216.

[4] During the condemnation proceedings of 75-4448 the appellant Jim Dodson conveyed his interest in the condemned property to Patricia Womack. On March 21, 1975 Judge Bottle granted Georgia Power's motion to add Patricia Womack as a defendant.

[5] The composition of the Commission and the Instructions given to the Commissioners are the same in both cases before us.

Erie Railroad Co. v. Tompkins, 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, and the Rules of Decision Act[6] direct that state law apply of its own force. Even if the source is federal, the court must follow any congressional directions about the proper law to apply. *See* Comment, *Adopting State Law as the Federal Rule of Decision: A Proposed Test,* 43 U.Chi.L.Rev. 823, 826 (1976).

We find that the source of the power to condemn property contained in Section 21 is federal. Eminent domain inheres in sovereignty. *See Kohl v. United States,* 1876, 91 U.S.C. 367, 23 L.Ed. 449. Within our federal system the states and the federal government exercise independent powers of eminent domain, and neither can delegate the use of the other's authority. 91 U.S. at 372-73, 23 L. Ed. 449; *Latinette v. City of St. Louis,* 7 Cir. 1912, 201 F. 676, 678. Thus, when Congress provided that licensees could exercise "the" power of eminent domain, it was referring to the federal power. Both courts and commentators have described the eminent domain power delegated in Section 21 as the federal power. *Federal Power Commission v. Tuscarora Indian Nation,* 1960, 362 U.S. 99, 120, 80 S.Ct. 543, 4 L.Ed.2d 584; *City of Tacoma v. Taxpayers of Tacoma,* 1958, 357 U.S. 320, 340, 78 S.Ct. 1209, 2 L.Ed.2d 1345; *Chapman v. Public Utility District No. 1,* 9 Cir. 1966, 367 F.2d 163, 167; 7 *Moore's Federal Practice* ¶ 71A.10[2]. When it condemns land under Section 21, a licensee acts as the agent of the United States government. *Tuscarora Nation of Indians v. Power Authority,* 2 Cir. 1958, 257 F.2d 885, 894, *vacated as moot sub nom,*

---

[6] The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as the rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 1652 (1970).

McMorran v. Tuscarora Nation of Indians, 362 U.S. 608, 80 S.Ct. 960, 4 L.Ed.2d 1009. This delegation of federal power is constitutional. *Missouri v. Union Electric Light & Power Co.,* C.D.Mo. 1930, 42 F.2d 692; *see Thatcher v. Tennessee Gas Transmission Co.,* 5 Cir. 1950, 180 F.2d 644, *cert. denied,* 340 U.S. 829, 71 S.Ct. 66, 95 L.Ed. 609 (upholding identical delegation in the Natural Gas Act, 15 U.S.C. § 717(b) (1970)).

Appellants argue that Section 21 does not delegate federal authority, but merely provides a federal forum for exercise of a state created eminent domain power. Such an interpretation does not accord with decisions upholding the right of a licensee to condemn property that it could not obtain under the applicable state statute. *E. g., City of Tacoma v. Taxpayers of Tacoma,* 1958, 57 U.S. 320, 78 S.Ct. 1209, 2 L.Ed.2d 1345; *First Iowa Hydro-Electric Cooperative v. Federal Power Commission,* 1946, 328 U.S. 152, 66 S.Ct. 906, 34 L.Ed. 1143. There is no suggestion in the statute that Congress intended to create an interstitial power of eminent domain that would function only when state powers were inadequate. In contrast, Section 19, 16 U.S.C. § 812 (1970) expressly limits the FPC's authority to regulate rates to situations where a state does not have its own regulations. Section 20, 16 U.S.C. § 813 (1970) places similar limits on other powers of regulation.

We are not persuaded by the argument that the $3,000 in controversy requirement shows that Section 21 is a jurisdictional provision. It is true that this requirement parallels the amount in controversy requirement for diversity cases at the time the Federal Power Act was enacted. Congress, however, added the $3,000 requirement late in the consideration of the Federal Power Act. *Compare* H.R.Rep.No.715, 65th Cong., 2d Sess. 27, H.R.Rep.No. 1147, 65th Cong., 3d Sess. 13, *and* H.R.Rep.No.61, 66th Cong., 1st Sess. 10 (original versions without the $3,000 amount in controversy requirement) *with* S.Rep.No.180,

66th Cong., 1st Sess. 9 and 16 U.S.C. § 814 (1970) (versions containing $3,000 amount in controversy requirement as added on the House floor). As a result, the requirement cannot be read as an indication of the original purpose of Section 21. Members of Congress do not seem to have believed the amount in controversy amendment significantly changed Section 21; the Senate and Conference Committee Reports, written after the House adoption of the amendment, do not mention it. Furthermore, the House debates establish that the amount in controversy minimum was designed to prevent inconvenience to a landowner who might otherwise need to travel several hundred miles to press a small compensation claim. 58 Cong.Rec. 2240 (1919) (remarks of Mr. Stevenson).

We have not found any congressional directive to apply state law in either the language of Section 21 or its legislative history. Therefore, the second prerequisite to our consideration of the choice of law issue is met. The language in the statute referring to state "practice and procedure" does not govern the choice between substantive rules of compensation. The Supreme Court has held that such language "[does] not, and could not, affect questions of substantive right—such as the measure of compensation—grounded upon the Constitution of the United States". *United States v. Miller,* 1943, 317 U.S. 369, 380, 63 S.Ct. 276, 283, 87 L.Ed. 336. *Accord United States v. 93.970 Acres of Land,* 1959, 360 U.S. 328, 79 S.Ct. 1193, 3 L.Ed.2d 1275. The appellants attempt to distinguish *Miller* on the ground that the plaintiff was the United States rather than a private licensee. We cannot see why in this context the identity of the plaintiff would change the meaning of virtually identical language.[7] And insofar as Sec-

---

[7] The *Miller* opinion specifically interpreted the following statutes:

> In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be,

tion 21 did require conformity with state practice, it has been superseded by Rule 71A of the Federal Rules of Civil Procedure. *United States v. 93.970 Acres of Land,*

---

authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

40 U.S.C.A. § 257.

The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such [district court is] held, any rule of the court to the contrary notwithstanding.

Act of Aug. 1, 1888, c. 728 § 2, 25 Stat. 357. This section was codified, as amended, at 40 U.S.C. § 258 until it was superceded by Rule 71A of the Federal Rules of Civil Procedure.

The Secretary of the Army may cause proceedings to be instituted, in the name of the United States in any court having jurisdiction of such proceedings, for the acquirement by condemnation of any land, right of way or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided, however,* That when the owner of such land, right of way, or material shall fix a price for the same, which in the opinion of the Secretary of the Army, shall be reasonable, he may purchase the same at such price without further delay; *And provided further,* That the Secretary of the Army is authorized to accept donations of land or materials required for the maintenance or prosecution of such works.

33 U.S.C.A. § 591.

1959, 360 U.S. 328, 79 S.Ct. 1193, 3 L.Ed.2d 1275; 7 *Moore's Federal Practice* ¶ 71A.10[2] at 71A-252 (2d ed. 1975).

There is little discussion of Section 21 in the Committee Reports or the congressional debates, and none of it illuminates the choice of law issue. Appellants argue, however, that other sections of the statute, such as Sections 19 and 20, evidence a congressional respect for state law which includes state rules of compensation in an eminent domain proceeding. We are not ready to make this inference from unrelated provisions in the Federal Power Act without more support in the legislative materials. The legislative history reveals that Congress took care to preserve state rights in the regulation of power and property to forestall a constitutional attack on the Federal Power Act. *See, e. g., First Iowa Hydro-Electric Cooperative v. Federal Power Commission,* 328 U.S. at 174, 66 S. Ct. 906. As a result, the Federal Power Act contains many explicit acknowledgements of state authority. *See, e. g., Id.* at 174 n. 19, 66 S.Ct. 906; Sections 4(a) and (c) [8] (requires cooperation between the FPC and the executive departments and other agencies of the state and federal governments on specified subject); 4(f)[9] (requires notice of application for a preliminary permit to be given to any state or municipality likely to be interested); 7(a)[10] (gives preference in issuing permits and licenses to states and municipalities); 10(e)[11] (provides that certain licenses to states and municipalities be issued and enjoyed without charge); 14 [12] (gives states or municipalities as well as federal government an option to acquire a licensed

---

[8] 16 U.S.C. § 797(a) and (c) (1970).

[9] 16 U.S.C. §797(f) (1970).

[10] 16 U.S.C. § 800(a) (1970).

[11] 16 U.S.C. § 803(e) (1970).

[12] 16 U.S.C. § 807 (1970).

project); 19;[13] 20;[14] and 27[15] (a "saving" clause concerning state laws relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein). The failure to mention specifically state laws of eminent domain contrasts with these provisions, and suggests, if anything that Congress did not believe it necessary to follow state eminent domain rules or desire courts to do so.[16]

The Committee Reports reveal that some members had concerns over the constitutionality of Section 21, although it is not clear whether they thought it an improper invasion of state prerogatives or an improper delegation of

[13] 16 U.S.C. § 812 (1970).

[14] 16 U.S.C. § 813 (1970).

[15] 16 U.S.C. § 821 (1970).

[16] The dissent makes much of the fact that Congress did not assure "application of a uniform, federal standard in any exercise of eminent domain power, *state* or federal, to acquire land on which to build these federally regulated facilities". (Emphasis changed.) This omission becomes much less telling when one realizes that it is not certain that Congress had the power to compel such uniformity.

Congress could not have simply passed a statute instructing the states to apply federal rules of compensation whenever a licensee chose to exercise a state-granted power of eminent domain to take property for a licensed project. As Justice Brandeis stated in *Erie*: "Congress has no power to declare substantive rule of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts". 304 U.S. at 78, 58 S.Ct. at 822.

Nor could Congress have passed a law forbidding a state from delegating state eminent domain power to a federal licensee. A state has exclusive control over its power of eminent domain. *Kohl v. United States*, 91 U.S. at 372-73, 23 L.Ed. 449. Just as the federal government could not force the states to grant licensees the use of eminent domain power, it could not force them to make the grant.

federal authority to private parties. H.R.Rep.No.61, 66th Cong., 1st Sess. 10. At any rate, a majority expressed belief that the provision was constitutional and appropriate, without any indication that such a conclusion would be possible only if federal courts applied state law in Section 21 cases. *Id.*[17]

The appellants also argue that Congress endorsed the use of state compensation law when it enacted a provision substantially identical to Section 21 in the Natural Gas Act, 15 U.S.C. § 717f(h) (1970), without commenting adversely on certain cases appellant read to mandate adoption of state law for all substantive issues arising in a Section 21 lawsuit. In a similar vein, the appellants urge us to follow these decisions as a matter of stare decisis. In particular, they draw our attention to a line of Eighth Circuit cases beginning with *Feltz v. Central Nebraska Public Power and Irrigation District*, 8 Cir. 1942, 124 F.2d 578[18] and to *Oakland Club v. South Carolina Public Service Authority*, 1940, E.D.S.C., 30 F. Supp. 334, *aff'd*, 4 Cir. 1940, 110 F.2d 84.

We do not read these cases of determinative of the issue before us. In *Feltz*, a FPC licensee condemned land for relocation of a highway. The landowner claimed con-

[17] We note that Congress passed the Federal Power Act in 1920, during the era of *Swift v. Tyson*, 1842, 41 U.S. 1, 10 L.Ed. 865. Thus, Congress would have expected federal courts to apply general common law absent a specific congressional direction to the contrary.

[18] The other Eighth Circuit cases are *Central Nebraska Public Power & Irrigation Dist. v. Harrison*, 8 Cir. 1942, 127 F.2d 588, *Central Nebraska Public Power & Irrigation Dist. v. Fairchild*, 8 Cir. 1942, 126 F.2d 302; *Samuelson v. Central Nebraska Public Power & Irrigation Dist.*, 8 Cir. 1942, 125 F.2d 838; *Burnett v. Central Nebraska Public Power & Irrigation Dist.*, 8 Cir. 1942, 125 F.2d 836; *McGinley v. Central Nebraska Public Power & Irrigation Dist.*, 8 Cir. 1942, 124 F.2d 692; and *Central Nebraska Public Power & Irrigation Dist. v. Berry*, 8 Cir. 1942, 124 F.2d 586.

sequential losses because the property was divided and because of increased distance to the railhead. The jury gave a smaller award than the appraisers, and the court added interest from the date of the taking. Both sides appealed. Among other questions, the court of appeals ruled on the exclusion of evidence of consequential damages, 124 F.2d at 578, and the propriety of interest on a compensation award, 124 F.2d at 584. Without articulating its reasoning, the court indicated that Nebraska law controlled both issues. There is no indication that the parties contested this issue or that the court gave it any serious consideration. Indeed, because of the mixture of issues each party may have thought it to his advantage to rely upon state law. The condemnees had read that state law to allow consequential damages and the condemnor could cite favorable state law on interest. The specific issue of just compensation raised before this Court was not considered. The other Eighth Circuit cases also lack any discussion of a general choice of law problem or of the specific issue before us. In the absence of any reasoned discussion of the difficult choice of law issue, we cannot accept these cases as persuasive authority or interpret congressional inattention to them as an endorsement of the view that state law should fill all substantive gaps in Section 21.

Oakland Club is not on point. In that case the federal licensee enjoyed state as well as federal power of eminent domain. It filed a condemnation in federal court which the property owner contested on the grounds that the South Carolina procedure was constitutionally defective and that Section 21 authorized the licensee to take only an easement rather than a fee.

The district court upheld the state procedure and interpreted Section 21 to authorize the taking of a fee interest. It went on to make several observations that the appellants have emphasized in this case. First, the court stated

that Section 21 is not a "comprehensive, self-contained and exclusive law of eminent domain". Second, the court construed Section 21 "not as an exclusive law of eminent domain, . . . but as complementary to the State law, and as enabling the holder of a Federal Power license to exercise in the Federal courts . . . the substantive rights of eminent domain granted to it under the State law." 30 F.Supp. at 341. The Court of Appeals approved of these statements and added its own suggestion that Section 21 was meant to give a condemnor 'the privileges of eminent domain under the State law . . ." 110 F.2d 84, 86.

Insofar as the *Oakland Club* litigation stands for the point that Section 21 does not preempt any applicable state powers of eminent domain, it is irrelevant to the issue before us.[19] Insofar as the case supports the argument that Section 21 is solely a jurisdictional provision, we reject it for the reasons already expressed. And insofar as it interprets Section 21 to grant a state rather than a federal power of eminent domain, we find it in conflict with holdings by the Supreme Court. *See Federal Power Commission v. Tuscarora Indian Nation,* 1960, 362 U.S. 99, 120, 80 S.Ct. 543, 4 L.Ed.2d 584; *City of Tacoma v. Taxpayers of Tacoma,* 1958, 357 U.S. 320, 340, 78 S.Ct. 1209, 2 L.Ed.2d 1345; *see also Kohl v. United States,* 1876, 91 U.S. 367, 372-73, 23 L.Ed. 449, 451 (federal government lacks the power to grant the use of a *state* power of eminent domain). Neither the district court nor the Court of Appeals in *Oakland Club* considered the specific issue whether state or federal law governs the methodology of determining compensation under Section 21. In sum, the *Oakland Club* opinions are far too questionable

---

[19] This Circuit has held that § 7(h) of the Natural Gas Act, 15 U.S.C.A. § 717(h), which is almost identical to § 21 of the Federal Power Act, does not preempt state laws of eminent domain. *Robinson v. Transcontinental Gas Pipe Line Corp.*, 5 Cir. 1970, 421 F.2d 1397, *cert. denied,* 398 U.S. 905, 90 S.Ct. 1695, 26 L.Ed.2d 64.

and unclear to justify adherence by this Court or to warrant an interpretation of congressional failure to comment upon them as an expression of legislative intent on the choice of law issue before us.[20]

III.

We now proceed to the principal issue. Because the source of the power delegated by the Federal Power Act is federal, the governing law must be federal. *See, e.g.*, Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L.Rev. 383, 407 (1964); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U.Pa.L.Rev. 797, 798-801 (1957); Comment, *Adopting State Law as the Federal Rule of Decision: A Proposed Test*, 43 U.Chi.L.Rev. 823, 826-27 (1976). Of course, federal law may be fashioned by adopting parallel

[20] The other cases cited in various landowner briefs as expressing a direct or indirect conclusion that state law of compensation applies in a Section 21 condemnation are also off the mark. *King v. Grand River Dam Auth.*, 10 Cir. 1964, 336 F.2d 682, expressly refuses to reach the issue. *Id.* at 683. In *Tennessee Gas Transmission Co. v. Thatcher*, 1949 W.D.La., 84 F.Supp. 344, *aff'd sub nom Thatcher v. Tenn. Gas Transmission Co.*, 5 Cir., 1950, 180 F.2d 644, *cert. denied*, 340 U.S. 829, 71 S.Ct. 66, 95 L.Ed. 609, a landowner challenged § 7(h) of the Natural Gas Act. Among his theories was one that the Act violates the fifth amendment because it makes no provision within itself for ascertaining and paying adequate compensation. The district court rejected this challenge, noting that "it has been uniformly held that state *procedure* may be used in condemnation cases under Federal Laws" and citing *Oakland Club*. *Id.* at 346 (emphasis added). The Court of Appeals did not discuss the question specifically. The trial judge's statement is ambiguous and may refer only to procedural matters that have been governed by Rule 71A since 1951. At any rate, the complete lack of reasoning to support the statement undercuts any comfort the opinion may give to the appellants here. All the other cases cited as precedent for appellants' position are also either off point or unpersuasive.

state rules. *E. g., Clearfield Trust Co. v. United States*, 1943, 318 U.S. 363, 367, 63 S.Ct. 573, 87 L.Ed. 838. For instance, the courts usually determine what constitutes "property" by looking to state law. *E. g., United States v. Certain Property Located In Borough of Manhattan*, 2 Cir. 1965, 344 F.2d 142, 144-45 (Friendly, J.); *United States v. 145.30 Acres of Land*, 1974 D.La., 385 F.Supp. 699, *aff'd*, 5 Cir. 1975, 524 F.2d 1231.

Courts apply independent rules, however, when considering the specific issue of compensation in federal condemnations. *E. g., United States v. Miller*, 1943, 317 U.S. 369, 380, 63 S.Ct. 276, 87 L.Ed. 336; *United States v. Certain Property Located in Borough of Manhattan*, 2 Cir. 1965, 344 F.2d 142, 146; *United States v. City of New York*, 2 Cir. 1948, 165 F.2d 526, 528 (L. Hand, J.); *United States v. Certain Parcels of Land*, 3 Cir. 1944, 144 F.2d 626, 628; *United States v. 3,595.98 Acres of Land*, 1962 N.D. Cal., 212 F.Supp. 617; 12 Wright & Miller, *Federal Practice and Procedure: Civil* § 3042 (1973). These cases did not arise in the specific context of a federal condemnation by a Federal Power Act licensee pursuant to Section 21. Nevertheless, we should follow the same rule unless there are circumstances unique to a federal condemnation under Section 21 which requires the opposite result.[21]

[21] Despite the dissent's implication to the contrary, we are well aware of Judge Friendly's distinction between the question whether an issue is a federal one so that federal courts may formulate a rule of decision and the question whether the rule formulated should follow state or uniform national law. Judge Simpson reads these cases to establish only the first step, that compensation in a federal condemnation is a federal question. But the cases take the second step. They chose to apply uniform nation-wide rules.

For instance, as the excerpt quoted by the dissent shows, dissenting opinion, slip opinion at p. 958, at p. —— n. 6, the Supreme Court in *Miller* saw no need to determine local law of compensation. The reason was that the Court applied federal rules of decision. 317 U.S. at 373-79, 63 S.Ct. 276. The dissent singles out

The appellants suggest that several such circumstances exist. First, they contend that we should distinguish between cases where the United States is a party and where it is not, applying federal rules of compensation only in the former situation. Since a licensee exercises the federal power of eminent domain, it is not immediately apparent why such a distinction should be made. That the property will be used privately is not reason enough. In *Miller,* for instance, the United States took land for use by a private railroad. Appellants, however, cite *Public Utility District No. 1 v. City of Seattle,* 9 Cir. 1967, 382 F.2d 666, 1969, *cert. dismissed,* 396 U.S. 803, 90 S.Ct. 22, 24 L.Ed 59, and *Tacoma v. Taxpayers of Tacoma,* 1957, Wash., 307 P.2d 567, *rev'd,* 357 U.S. 320, 78 S.Ct. 1209, 2 L.Ed.2d 1345, to

---

United States v. Certain Property as an example of a proper analysis of the choice of law issue. Dissenting opinion, slip opinion at p. 958, at p. —— n. 7. The quoted segment suggests that Judge Friendly refused to rely on national law in federal condemnations. In fact, the quotation comes from a section of the opinion dealing only with the definition of "property", an issue not raised in this case. When Judge Friendly considered the much more relevant compensation question he acknowledged that compensation in federal condemnations is set by federal rules. He looked to state decisions only "in the absence of some authoritatively determined federal rule to the contrary" and only to the extent that the persuasiveness of state decisions justified including them into the national law. 344 F.2d at 147.

Nowhere do we suggest that the proper analysis for a choice of law question changes because the issue is one of just compensation in a federal condemnation. Nor do we consider ourselves blindly bound by past cases in the sense of reading them to mandate federal rules of compensation in every federal condemnation. We do find, however, that these cases are helpful starting points. Other courts in federal compensation cases have balanced the state and federal interests and have concluded that federal, rather than state, law should apply the rules of compensation. Unless we find the weights on our scale to be substantively different, we see no reason to diverge from the conclusion of the Supreme Court and some of our Courts of Appeals.

support a theory that the Federal Power Act delegates less than the full power of eminent domain. As a result, the appellants continue, a licensee should not benefit from the same legal rules as the United States.

In *City of Seattle* the Court considered whether a licensee must compensate the owner of shorelands and, for power site values, the owner of adjoining uplands, for property needed for a licensed hydroelectric project. The United States would not have paid any compensation if it had condemned the same property. Instead, it could have relied upon the dominant navigational servitude for its power to utilize without compensation the stream bed and shorelands of navigable waters up to the ordinary high water level. *See* 382 F.2d at 669; *United States v. Twin City Power Co.,* 1956, 350 U.S. 222, 76 S.Ct. 259, 100 L.Ed. 240. The Ninth Circuit examined the Federal Power Act and determined that it did not delegate the dominant servitude of navigation. Thus, it found that in the circumstances before it a licensee must pay compensation because it, unlike the Government, takes something it does not already have. 382 F.2d at 672. With respect to power site values, the Court determined that the rule precluding assertion of power site value against the United States, *United States v. Twin City Power Co.,* 1956, 350 U.S. 222, 76 S.Ct. 259, 100 L.Ed. 240, goes "hand in hand" with the dominant navigational servitude and thus is not available to a licensee. 382 F.2d at 673-74.

Whether a licensee enjoys the dominant navigational servitude is irrelevant to the issue before us. The Ninth Circuit did not question that Section 21 delegates some of the federal government's powers. And the opinion does not support the contention that a licensee enjoys anything less than the full federal power to condemn private property. Significantly, when the Ninth Circuit turned to the amount of compensation due the shoreland and upland property owners it relied exclusively on federal cases. *See* 382 F.2d at 673-74.

Tacoma holds that Section 21 does not give a licensee power to condemn state-owned land. The theory of the case appears to be that Congress *could not* delegate such power to a state-created entity, rather than that it did not intend to do so. 207 P.2d at 577. This theory is questionable at best. *See First Iowa Hydro-Electric Cooperative v. Federal Power Commission,* 1946, 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143; *Kohl v. United States,* 1876, 91 U.S. 367, 23 L.Ed. 449; *Washington Department of Game v. Federal Power Commission,* 9 Cir. 1953, 207 F.2d 391, 1954, *cert. denied,* 347 U.S. 936, 74 S.Ct. 626, 98 L.Ed. 1087.[22] Even if this holding is correct, it does not affect a licensee's power to acquire privately held land.

Although the Supreme Court has never ruled directly on the scope of the delegation of federal power in Section 21, *Federal Power Commission v. Tuscarora Indian Nation,* 1960, 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584, suggests that the delegation is not a limited one. As part of its case against condemnation by a FPC licensee, the Indian Nation argued that 25 U.S.C. § 177 [23] applied to the condemnation of its lands. The Court rejected this contention:

> But § 177 is not applicable to the sovereign United States *nor hence to its licensees* to whom Congress has delegated federal eminent domain powers under § 21 of the Federal Power Act.

---

[22] Although the Supreme Court reversed *Tacoma* on the technical ground that the state litigation constituted an improper collateral attack on a FPC determination, the Court's opinion casts doubt on the validity of the state court's substantive holding as well. *See City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320, 339-40, 78 S.Ct. 1209, 2 L.Ed.2d 1345.

[23] No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

362 U.S. at 120, 80 S.Ct. at 555 (emphasis added). In its discussion of this point the Court cited decisions in which the United States was a party without any indication they would not be equally applicable to a federal licensee. *See* 362 U.S. at 120-21, 80 S.Ct. 543.

Similarly, in *Grand River Dam Authority v. Grand-Hydro,* 1948, 335 U.S. 359, 69 S.Ct. 114, 93 L.Ed. 64, the Supreme Court appears to draw no distinction between the federal government and its licensee under the Federal Power Act:

> If either the United States, or its licensee as such, were seeking to acquire this land under the Federal Power Act, it might face different considerations from those stated above.

335 U.S. at 373, 69 S.Ct. at 121. *See also Public Utility District No. 1 v. City of Seattle,* 9 Cir. 1967, 382 F.2d 666, 675 (Byrne, J., dissenting), 1969, *cert. demissed,* 396 U.S. 803, 90 S.Ct. 22, 24 L.Ed.2d 59.

In summary, we find no reason to ignore the general rule of following federal law to set compensation in a federal condemnation because the United States is not taking the land directly.

Second, the appellants have argued that the federal interest in the value of property taken in a Section 21 proceeding is so small that the analysis established by *Clearfield Trust Co. v. United States,* 1943, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 and its progeny, including most recently *Miree v. DeKalb County,* 1977, —— U.S. ——, 97 S.Ct. 2490, 53 L.Ed.2d 557, compels federal adoption of state law. Even if a sharp distinction between a licensee and the United States cannot be drawn, it may be that the federal interest in the price paid for licensed hydroelectric plants is less than in other government projects. If so, use of state law would be appropriate notwithstanding the usual rule that federal common law of compensation governs in federal condemnation.

A review of *Clearfield, Miree,* and other federal common law decisions fails to convince us, however, that state law should be followed. That review reveals a changing emphasis of factors and shifting preferences for one law or the other. In *Clearfield Trust* the Court chose uniform federal common law to govern an action against the United States on a federal check. The federal interest in uniformity for easier administration was sufficient to justify use of uniform federal common law. *See* 318 U.S. at 366, 63 S.Ct. 573; Comment, *Adopting State Law as the Federal Rule of Decision: A Proposed Test,* 43 U.Chi.L. Rev. 823, 831 (1976).

United States v. Standard Oil Company, 1947, 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067 also took a hospitable stance to the use of federal common law. That case posed the question whether the United States could recover for damages suffered when a serviceman is injured. The Court found first that the source of any legal right to recover should be federal. It then held such federal law should be uniform because there was no affirmative need for diverse results, the issue did not involve local concerns, and a uniform rule would be appropriate in fiscal matters. *Id.* at 310-11, 67 S.Ct. 1604.

Other cases diverge from the presumption favoring federal law. For instance, *Bank of America v. Parnell,* 1956, 352 U.S. 29, 77 S.Ct. 119, 1 L.Ed2d 93 refused to extend the *Clearfield* approach of uniform law to suits between private parties simply because the subject matter of the controversy happens to be federal commercial paper. Instead, the Court indicated that an immediate federal interest must be involved. *Id.* at 33-34, 77 S.Ct. 119. And in *Wallis v. Pan American Petroleum Corp.,* 1966, 384 U.S. 63, 86 S.Ct. 1301, 16 L.Ed.2d 369, the Supreme Court indicated that state law should usually govern unless a "significant conflict between some federal policy or interest and the use of state law in the premises" is

shown. *Id.* at 68, 86 S.Ct. at 1304. *Accord Miree v. DeKalb County,* 1977, —— U.S. ——, 97 S.Ct. 2490, 53 L.Ed.2d 557. The Court found no such interest in *United States v. Yazell,* 1966, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404, a suit by the federal government to collect a debt owed the Small Business Administration. The Court held that Texas community property rules would apply because the Small Business Administration had individually negotiated the loan in the context of and with specific reference to Texas law and because the role of the United States as creditor in the case was no different from any private creditor. The Court also noted the intense local interest in family property and the protection of women, as well as the lack of any existing federal common law to apply. *Id.* at 346-53, 86 S.Ct. 500. In *United States v. Little Lake Misere Land Co.,* 1973, 412 U.S. 580, 93 S.Ct. 2389, 37 L.Ed.2d 187, on the other hand, the Supreme Court refused to adopt state law. The issue in *Little Lake* was whether a state statute retroactively making mineral rights imprescriptible should govern federal land acquisitions under the Migratory Bird Conservation Act.[24] Adoption would have deprived the federal government of a contract transferring the mineral rights to the land in question ten years after its acquisition. The statute conflicted with the federal program because it deprived the government of its contractual interests and created uncertainty in land transactions under the Act. *Id.* 382 U.S. at 596-99, 86 S.Ct. 500.

Together these cases produce a balancing test. *See generally* Comment, *Adopting State Law as the Federal Rule of Decision: A Proposed Test,* 43 U.Chi.L.Rev. 799 (1976). On one side is the federal interest in carrying out a program in the most efficient and effective manner possible. On the other is a state's interest in the preservation of its control over local interests, particularly traditional

[24] 16 U.S.C. § 715 *et seq.* (1970).

interests such as family law and real property transactions, and in preventing displacement of state law. Of course, the ultimate goal of the creation of federal law by the courts is to carry out the federal program in question. *See United States v. Little Lake Misere Land Co.*, 412 U.S. at 584-601, 93 S.Ct. 2389; *United States v. Standard Oil Co.*, 332 U.S. at 309-11, 67 S.Ct. 1604. Thus, if state law would actually frustrate rather than only hinder a federal program, federal common law *must* be applied regardless of state interests. *See, e. g., United States v. Little Lake Misere Land Co.* On the other hand, the Supreme Court has demonstrated a growing desire to minimize displacement of state law. *See Miree v. DeKalb County*, 1977, —— U.S. ——, 97 S.Ct. 2490, 53 L.Ed.2d 557.

Each side of this controversy has provided us with weights for its side of the scale. Georgia Power points to the degree of federal involvement in a licensed project. A license is a prerequisite to construction of a project. 16 U.S.C. § 817 (1970). The design, construction, recreation facilities, and ecological impact of a project are subject to approval by the FPC. 16 U.S.C. § 803, (1970), 18 C.F.R. § 4.41 *et seq.* (1977). The Commission has certain powers to regulate the rates and charges of electricity generated by the project. 16 U.S.C. §§ 812-13 (1970). Georgia Power also points out that the federal government has a financial interest in minimizing acquisition costs for a licensed project since it holds an option to acquire the project when the license expires upon payment of net investment, less certain items. 16 U.S.C. § 807 (1970). In addition, Georgia Power notes that the government may acquire a project in time of national emergency, 16 U.S.C. § 809 (1970).

The landowners emphasize that this lawsuit involves private parties and that Georgia Power (or any other licensee) is likely to condemn property only in the state where it operates. They also point out that property

rights are a traditional state concern and that Georgia has an elaborate law of eminent domain that reflects considered policy judgments a state would want the federal courts to respect. Finally they contend that no substantial rights and duties of the United States hinges on the outcome of this litigation.

The balance tips toward the need for federal law. That this controversy is between private parties is not determinative. *Miree v. DeKalb County*, —— U.S. ——, ——, 97 S.Ct. 2490, 53 L.Ed.2d 557 (Burger, C. J., concurring); *United States v. Little Lake Misere Land Co.*, 412 U.S. at 592-93, 93 S.Ct. 2389; *Bank of America v. Parnell*, 352 U.S. at 34, 77 S.Ct. 119. Nor must we automatically apply state law because property is involved. *Little Lake* involved a property transaction. Moreover, eminent domain is not like most areas of property law, where state regulation has been virtually exclusive, but one where the United States has developed and exercises an independent power. *See, e. g., Kohl v. United States*, 91 U.S. 367, 23 L.Ed. 449. One possible reason for adopting state law as the federal rule of decision is the advantage of knowing what state law says compared with the uncertainty as to rules the federal courts would create. *See McKenna v. Wallis*, 5 Cir. 1965, 344 F.2d 432, 444 (Wisdom, J., dissenting), *rev'd sub nom., Wallis v. Pan American Petroleum Corp.*, 1966, 384 U.S. 63, 86 S.Ct. 1301, 16 L.Ed.2d 369; Note, *The Federal Common Law*, 82 Harv.L.Rev. 1512, 1519 (1969). Since federal law on compensation already exists, there is no such reason to adopt state law here.[25]

---

[25] At oral argument, appellants contended for the first time that there is no federal common law of compensation. They would limit *United States v. Miller*, 1943, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 and *Bauman v. Ross*, 1896, 167 U.S. 547, 17 S.Ct. 966, 42 L.Ed. 270, along with their rules that compensation need not include an increase in value created by the condemning project and may be

Most importantly, federal common law of compensation is the appropriate choice in this case because the use of state law could interfere with achievement of congressional aims. Even when Congress passed the Federal Power Act in 1920 its primary concern was to stimulate private development of America's hydroelectric power resources. *See, e. g., First Iowa Hydro-Electric Cooperative v. Federal Power Commission,* 1946, 328 U.S. 152, 180, 66 S.Ct. 906, 90 L.Ed. 1143; 56 Cong.Rec. 9810 (remarks of Mr. LaFollette); H.R.Rep.No.715, 65th Cong., 2d Sess. 15. That goal has become even more significant with the energy shortages of the 1970's and the adoption of a national policy to reduce dependence on foreign sources of energy. To fulfil that congressional policy, hydroelectric development must be maximized. The use of state rules of compensation when they would produce a substantially higher award for the landowner could retard development and frustrate the goal of full utilization of hydroelectric

---

offset by benefits created in remaining property, to the specific statutes implicated in the cases.

This contention should have been raised long ago so the trial court could have considered it. Without ruling on the propriety of the instructions actually given below—an issue not properly before us, *see, e. g., Commercial Credit Business Loans, Inc. v. St. Louis Terminal Field Warehouse,* 5 Cir. 1974, 514 F.2d 75, 77—we reject the appellants' general point that there is no federal common law of compensation. Cases such as *Miller* and *Bauman* have force independent of their statutory context. *See, e.g., United States v. Trout,* 5 Cir. 1967, 386 F.2d 216, 221. They hold that the compensation requirements of the fifth amendment—not solely of the statutes involved—are satisfied when project enhancement value is excluded and a set-off for specific benefits to remaining property is allowed. Only the fifth amendment limits the federal power of eminent domain, 1 *Nichols' The Law of Eminent Domain* §§ 1.14 & 1.3 (rev. 3d. ed. 1976). Since we find no indication that Congress did not delegate all of the federal power to condemn private property, the federal law defining the minimum compensation requirements of the fifth amondment becomes the law of compensation for a § 21 case.

resources. If we considered only the increased cost to the Lake Wallace project from these appeals the interference with the federal policy might not appear significant. When, however, all the acquisitions for a major project are grouped together, and even more so when many licensed projects are considered as an aggregate, the increase in cost and the accompanying chill on development resulting from adoption of state rules such as those in Georgia would be substantial. State compensation rules could also interfere with the national interest in reducing energy costs because the higher land acquisition expenses would need to be offset by higher utility rates.

The federal government's option under Section 14 of the Act, 16 U.S.C. § 807, to acquire a project at the expiration of a license creates another United States interest in minimizing the cost of licensed facilities by applying federal valuation rules. *See First Iowa Hydro-Electric Cooperative v. Federal Power Commission,* 328 U.S. at 172-73, 66 S.Ct. 906;[26] *Public Utility District No. 1 v. City of Seattle,* 9 Cir. 1967, 382 F.2d 666, 675 (Byrne, J. dissenting) 1969, *cert. dismissed,* 396 U.S. 803, 90 S.Ct. 22, 24, L.Ed.2d 59. Congress expressed an interest in keeping this option price down when it passed the Federal Power Act. Rep. Ferris submitted a Minority Report to the original House Bill, because it did not include a provision limiting the option price of projects which had decreased in value to the fair value of the property taken. H.R.Rep.No.715, 65th Cong., 2d Sess. 40 (Minority Report). In Rep. Ferris' eyes, this omission meant the op-

---

[26] In *First Iowa* the Supreme Court wrote:

> The closeness of the relationship of the Federal Government to these [licensed] projects and its obvious concern in maintaining control over their engineering, economic and financial soundness is emphasized by such provisions as those of § 14 authorizing the Federal Government, at the expiration of a license, to take over the license project . . .

328 U.S. at 172-73, 66 S.Ct. at 915-16.

tion price could be so high that no government would be justified in paying it. *Id.* at 40. Congress eventually added Rep. Ferris' amendment, thereby expressing an interest in controlling acquisition costs. Use of federal compensation standards would reduce the option price and further this congressional desire to make government acquisition a realistic possibility.

For these reasons, we find that nothing in *United States v. Clearfield Trust Co.* and its progeny gives reason to diverge from the practice of employing federal compensation rules in a federal compensation proceeding. If anything, those cases push toward use of the federal law. As required by *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 86 S.Ct. 1301, 16 L.Ed.2d 369, a significant conflict between the federal policy of the Federal Power Act and the use of Georgia law can be shown.[27]

---

[27] Judge Simpson disputes this conclusion. He says our concern that Georgia law may interfere with the development of hydroelectric power has led us down the wrong path travelled by the panel majority in *McKenna v. Wallis*. Dissenting opinion, slip opinion at p. 961, at p. ——. We disagree. The legislative history to the Federal Power Act shows that Congress strongly sought full and rapid development of hydroelectric power. That federal interest is solid and important. The panel in *Wallis* relied on a federal policy against monopolization of federally owned mineral deposits as well as a policy of development. The Supreme Court reversed the panel not because those policies were abstract or unimportant, but because Louisiana law did not interfere with them.

Wallis turned on whether the interstices of a federal statute making federal oil and gas leases assignable should be filled with Louisiana law which did not recognize title by parol and resulting or constructive trusts. The panel majority's conclusion that Louisiana law would frustrate important policies rested on the unusual and speculative premise that:

> Trusts ex maleficio are part of the congressional scheme for carrying out the national policies on mineral resources and monopoly. In litigation between private persons over the nature of the ownership of a federal mineral lease, national policies on mineral resources and monopoly will suffer unless courts recognize beneficial title to the lease in a claimant whom the Secretary has not investigated and has not approved as lessee, and who may be unknown to the Secretary.

McKenna v. Wallis, 5 Cir. 1965, 344 F.2d 432, 447-48 (Wisdom, J., dissenting), *rev'd*, 384 U.S. 63, 86 S.Ct. 1301, 16 L.Ed.2d 369.

The civil law of Louisiana was clear and both easy and inexpensive to apply. In some ways, it promoted federal interests better than the common law. 344 F.2d at 446 (Wisdom, J., dissenting). It is certainly difficult to see how the choice of Louisiana law would interfere with the policies the panel majority claimed to be protecting. The federal government has the power to disapprove assignments running afoul of the anti-monopoly policy no matter what law governs assignments. 384 U.S. at 70, 86 S.Ct. 1301. Nor did the panel explain how the trust ex maleficio—rarely invoked even in jurisdictions that recognize it—could encourage development.

The difference in this case arises from the simple fact that people are more hesitant to pay more money for property than they are to meet inexpensive filing requirements. That Georgia provides some formula of compensation does not mean state law offers a feasible route to the federal objective if the resulting cost is substantially higher. We disagree with the dissent's assertion that any interference from the Georgia statute is conjectual. Dissent, slip opinion at p. 960, at p. ——. In No. 75-4448 the difference amounts to $540 an acre—a substantial difference totaling almost $30,000 for that small tract alone. If Georgia law added a similar premium on every acre needed for the project in additional cost would be $11,456,100. Even if the average premium is only one-tenth of the one in No. 75-4448, the extra cost will be over $1,000,000. It is more than conjecture to conclude that such additional costs could interfere with the policy of full hydroelectric development.

The appellants have raised a third argument against federal law in Section 21 cases. They contend that if we apply federal common law, licensees such as Georgia Power will have the choice of a Section 21 suit in federal court with federal rules or a suit in state court governed by state law. This, they continue, is the type of forum shopping *Erie Railroad Co. v. Tompkins* condemns. *See also Hanna v. Plummer*, 1965, 380 U.S. 460, 85 S.Ct. 1136,

14 L.Ed.2d 8; *see generally,* Ely, *The Irrepressible Myth of Erie,* 87 Harv.L.Rev. 693 (1974). *Erie,* of course, does not apply directly to this litigation because the source of the Section 21 condemnation power is federal. *E. g., Clearfield Trust Co. v. United States,* 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838.

Any broader implications of the *Erie* decision about the desirability of uniformity between state and federal courts do not apply here either. If a licensee were to bring a Section 21 condemnation action in a state court, that court would be required to follow the same law as a federal court even if that were federal common law. Friendly, *In Praise of Erie—And of the New Federal Common Law,* 39 N.Y.U.L.Rev. 383, 405 (1964). *See also* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* at 825 (1973). If the proceeding in the state court is under the federal power, the defendant may remove. 7 *Moore's Federal Practice* ¶ 71A.10[2] at 71A—252 (2d ed. 1975).[28] Thus, there would not be different substantive rules of decision depending upon the forum chosen. If a licensee brought a *state* condemnation action in state court, state law would govern. *E. g., Grand River Dam Authority v. Grand Hydro,* 335 U.S. at 372-73, 69 S.Ct. 114. But, if a state condemnation action were brought in federal court —assuming there is jurisdiction[29]—state law would also

[28] A state based condemnation brought in state court by a federal licensee is not removable. 7 *Moore's Federal Practice* ¶ 71A.10[2] at 71A-253 (2d ed. 1975); *Algonquin Gas Transmission Co. v. Gregory,* D.Conn.1952, 105 F.Supp. 64, *cert. denied,* 344 U.S. 818, 73 S.Ct. 13, 97 L.Ed.637.

[29] Since § 21 does not appear to grant jurisdiction over state based condemnations, *but see Oakland Club v. South Carolina Public Service Ass'n,* 4 Cir. 1940, 110 F.2d 84, 86 and since a licensee's claim based on state law is not a federal question for purposes of jurisdiction on the basis of a general federal question, 7 *Moore's Federal Practice* ¶ 71A.11 (2d ed. 1975), such jurisdiction would most likely be based upon diversity of citizenship. *See* 12 Wright & Miller, *Federal Practice and Procedure: Civil* § 3055 (1973), 13 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3577 (1975).

govern of its own force under *Erie.* 12 Wright & Miller, *Federal Practice and Procedure: Civil* § 3055 (1973). Again, there would be no difference in substantive law according to forum. Insofar as the appellants' argument rests on the possibility that different substantive rules might be applied in a *state* action in state court compared with a *federal* action in federal court, they can find no comfort in *Erie.* Justice Brandeis said nothing about a need for uniformity in different causes of action based on similar or even identical facts.

IV.

The appellants argue *to us* that a decision to apply federal common law in this litigation would render Section 21, as applied, unconstitutional. The theory is that a law permitting Georgia Power to "grant" the benefits of Georgia law arbitrarily through its choice of forum denies equal protection to landowners sued under the federal rather than the state statute. This contention was mentioned (though not developed) in several of the original answers to Georgia Power's condemnation complaint, but otherwise appears to have received no attention below.[30] Part of the argument rests on a disputed factual assertion that Georgia Power arbitrarily discriminates among condemnees by bringing some state suits in state court, where the court would apply the more generous compensation formula, against landowners situated similarly to appellants. The district court had no opportunity to rule on this factual dispute or the equal protection argument. Therefore, we need not consider them. *See, e. g.,*

[30] The district court did not mention the issue in its order denying the motion to apply federal law.

Commercial Credit Business Loans, Inc. v. St. Louis Terminal Field Warehouse, 5 Cir. 1974, 514 F.2d 75, 77; *E. E. O. C. v. Standard Forge and Axle Co.*, 5 Cir. 1974, 496 F.2d 1392, 1394-95; *D. H. Overmyer Co. v. Loftin*, 5 Cir. 1971, 440 F.2d 1213, 1215, *cert. denied*, 404 U.S. 851, 92 S.Ct. 87, 30 L.Ed.2d 90. To the extent the equal protection issue is before us, we find it without merit. There can be no contention that any landowner will be awarded constitutionally inadequate compensation if federal law controls since the federal rules satisfy the requirements of the fifth amendment. *See, e. g., United States v. Miller*, 1943, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336. Nor can we seriously consider the possibility that there are constitutional difficulties whenever a prosecutor or other plaintiff meeting state action requirements may choose between two or more causes of action with different consequences for defendants. If there were, the Justice Department could not constitutionally choose to bring a civil antitrust suit against one offender and a criminal suit against another.

V.

The appellants have made several other arguments in their briefs and at oral arguments which we regard as unnecessary to discuss in this opinion. We have, however, considered these arguments. We find them to be without merit.

NO. 75-4448—AFFIRMED.

NO. 77-1327—AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS.

SIMPSON, Circuit Judge, dissenting:

Congress, in enacting a general scheme for the regulation of hydroelectric power, has authorized a state party licensed by the Federal Power Commission to bring a federal eminent domain action, but has failed to specify

whether state or federal law should govern the measure of compensation. It is our function as a federal court to choose which law to apply, neither having been legislatively mandated. Our choice must follow the Supreme Court's pronouncements regarding federal common law. Believing that the majority in this case has wrongly chosen to apply federal law, I dissent in order to register the reasons for my disagreemnt.

I. WHEN AND HOW TO MAKE A CHOICE OF LAW

In exercising its commerce power to enact a comprehensive regulatory plan, Congress recognized a distinct federal interest in the use of navigable waters for producing hydroelectric power. 16 U.S.C. §§ 791a et seq. (1970) (The Federal Power Act). As is the case with any federal legislation, Congress acted "against the background of the total *corpus juris* of the states", *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68, 86 S.Ct. 1301, 1304, 16 L.Ed.2d 369 (1966), citing Hart & Wechsler, The Federal Courts and the Federal System 435 (1953). Although the federal statute necessarily displaces some state law, the " 'presence of a federal statute does not necessarily imply that there is a congressional intent that any particular issue be resolved by reference to federal law' ",[1] "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress", *Wallis, supra*, at 68, 86 S.Ct. at 1304. A choice of law problem arises when Congress has failed to make that decision; the courts must then fill the vacuum by de-

[1] Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 Harv.L.Rev. 1084, 1090 (1964), cited in *McKenna v. Wallis*, 344 F.2d 432, 450 (5th Cir. 1965) (Wisdom, J., dissenting), *rev'd sub nom., Wallis v. Pan American Petroleum Corp.*, 382 U.S. 63, 86 S.Ct. 1301, 16 L.Ed.2d 369 (1966).

ciding which law shall govern. As Judge Friendly has put it:

> The issue that must be determined in each instance is what heed Congress intended to have paid to state law in an area where no heed need constitutionally be paid—more realistically, in Gray's famous phrase, "to guess what it would have intended on a point not present to its mind, if the point had been present".[3]

Regardless of whether state or federal law is chosen, "the question is one of federal policy . . . . And the answer to be given necessarily is dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law". *United States v. Standard Oil Co.*, 332 U.S. 301, 309-10, 67 S.Ct. 1604, 1609, 91 L.Ed. 2067 (1947). In his prescient dissent in *McKenna v. Wallis*, Judge Wisdom explained how the principles of federalism affect the choice of law:

> Before a court plugs a statutory gap with federal law that is inconsistent with local law . . . consideration for the position of the states in the federal system suggests that the Court find congressional intent that federal common law should prevail over state law. . . . When congressional intent is unclear or when a specific congressional intent never existed, a reasonable criterion is that judge-made common law should not prevail over local law unless that result is manifestly in the national interest. 344 F.2d at 444-45.

Judge Wisdom's view prevailed in the Supreme Court. In reversing the Fifth Circuit in *Wallis*, the Court stated: "In deciding whether rules of federal common law should

[3] Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L.Rev. 383, 410 (1964).

be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown." *Wallis, supra*, at 68, 86 S.Ct. at 1304. This language nearly, if not quite, establishes a presumption favoring state law in choice of law cases.[3]

A review of the Supreme Court's decisions in this area reveals a far more certain direction than what the majority calls "a changing emphasis of factors and shifting preferences for one law or the other". Majority opinion, *supra* (slip opinion at 949), at ——. Because the decision is one of federal policy, it will always be possible to identify some federal interest, and thus some conflict with state law necessitating a choice.[4] The key, as stated in *Wallis*, is that this conflict be "signficant". Thus, in the seminal case of *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943), federal law was chosen because

> [t]he issuance of commercial paper by the United States is on a vast scale . . . . The application of state law . . . would subject the rights and duties of the

[3] Judge Wisdom favored such a presumption in his *Wallis* dissent when he wrote: "The political logic of federalism supports placing the burden of persuasion on those urging national action", 344 F.2d at 445, quoting Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum.L.Rev. 543, 545 (1954). I find it incongruous that Judge Wisdom, whose position in *Wallis* was adopted by the Supreme Court, today dilutes his own proposition of a decade ago by writing that "the Supreme Court has demonstrated a growing desire to minimize displacement of state law", majority opinion, supra (slip opinion at 950), at ——.

[4] Of course, if application of either federal or state law would yield the identical result, there is no need to make a choice. See, e.g., *United States v. 3,959.98 Acres of Land*, 212 F.Supp. 617 (N.D. Cal. 1962).

> United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain. *Id.* at 367, 63 S.Ct. at 575.

In *Standard Oil Co. v. United States, supra,* the strength of the federal interest argued forcefully in favor of applying federal law: "perhaps no relationship between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces". 332 U.S. at 305, 67 S.Ct. at 1607. Similarly, in *United States v. Little Lake Misere Land Co., Inc.,* 412 U.S. 580, 93 S.Ct. 2389, 37 L.Ed. 2d 187 (1973), state law directly hostile to a clear, congressional declared federal interest was displaced because:

> [t]o permit state abrogation of the explicit terms of a federal land acquisition would deal a serious blow to the congressional scheme contemplated by the Migratory Bird Conservation Act and indeed to all other federal land acquisition programs. These programs are national in scope. . . . Certainty and finality are indispensable in any land transaction, but they are especially critical when, as here, the federal officials carrying out the mandate of Congress irrevocably commit scarce funds. *Id.* at 597, 93 S.Ct. at 2399.

In contrast, where the federal interest is attenuated or speculative, the cases favor application of state law absent a showing that such law is clearly inadequate to serve the federal interest. Thus, in *Bank of America National Trust and Savings Association v. Parnell,* 352 U.S. 29, 77 S.Ct. 119, 1 L.Ed.2d 93 (1956), state law was applied because the possibility that "the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of a converter . . . is far too specu-

lative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern". *Id.* at 33, 77 S.Ct. at 121. In *Wallis v. Pan American Petroleum Corp., supra,* although a panel of this Court concluded that the federal interest in promoting exploration for development of domestic reserves of oil and gas, as expressed in the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181 et seq., demanded application of federal common law to the assignability of leases, 344 F.2d at 441-442, the Supreme Court disagreed: "However fitting this approach may be where a State interposes unreasonable conditions on assignability, it can have no force in this instance because Louisiana concededly provides a quite feasible route for transferring any mineral lease . . ." 384 U.S. at 71, 86 S.Ct. at 1305. This Court was again reversed in *Miree v. DeKalb County, Ga.,* —— U.S. —, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977), in which the survivors of deceased airline passengers attempted to sue the county, as owner of a municipal airport, on a third party beneficiary theory, claiming protection under a contract between the county and the Federal Aviation Administration. The county claimed immunity from suit under Georgia law. Holding that state law should be applied, the Court noted that even though "the United States has a substantial interest in regulating aircraft travel and promoting air travel safety", this interest was too remote and speculative to warrant application of federal law "given the narrow question before us". *Id.* at ——, 97 S.Ct. at 2495.

II. Choice of Law and Compensation in Federal Condemnations

My first point of departure from the majority is in their apparent conclusion that the rules governing choice of law are different in the context of compensation in federal eminent domain actions. The majority states that "[c]ourts apply independent rules, however, when consid-

ering the specific issue of compensation in federal condemnations", and considers itself bound to follow these "independent rules" "unless there are circumstances unique to a federal condemnation under Section 21 which require the opposite result". Majority opinion, supra (slip opinion at 946), at ——. After rejecting possible distinctions based on Section 21, the majority concludes: "In summary, we find no reason to ignore the general rule of following federal law to set compensation in a federal condemnation because the United States is not taking the land directly". (slip opinion at 948), Id. at——.

With due respect, I think the majority misreads the cases dealing with choice of law in federal condemnation. The cases cited by the majority opinion, beginning with *United States v. Miller*, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1943), clearly establish that compensation in federal condemnation *is a federal question.*[5] What these cases do not establish, as I think the majority incorrectly interprets them, is that the federal common law of compensation is presumed to govern in all federal condemnations.[6] This distinction was concisely explained by Judge

---

[5] " 'Just compensation' is a federal question, as to which the state decisions are not authoritative." *United States v. City of New York*, 165 F.2d 526, 528 (2nd Cir. 1948).

[6] In *Miller*, respondents argued that state law should be applied because Congress had so required. The Court replied:

> We need not determine what is the local law, for the federal statutes upon which reliance is placed require only that, in condemnation proceedings, a federal court shall adopt the forms and methods of procedure afforded by the law of the State in which the court sits. They do not, and could not, affect questions of substantive right,—such as the measure of compensation,—grounded upon the Constitution of the United States. 317 U.S. at 379-80, 63 S.Ct. 283 [footnotes omitted].

This language is subject to many interpretations. To the extent that it may read to indicate that Congress "could not" apply state law to "the measure of compensation", it is dicta and of doubtful validity. Some courts have read *Miller* this broadly. *See, e.g., United States v. 63.04 Acres of Land*, 154 F.Supp. 198, 202 (E.D. N.Y. 1957) ["Since we are dealing with a federal question (just compensation), the State Court rules or criteria are not controlling or persuasive".]; 12 Wright & Miller, Federal Practice and Procedure: Civil § 3042 (1973). The principles of federalism argue strongly against so absolute a rule. Surely the theory underlying this rule was rejected by the Supreme Court in *Clearfield Trust* when it observed: "In our choice of the applicable *federal* rule we have occasionally selected state law". 318 U.S. at 367, 63 S.Ct. at 575 (emphasis added). *See also Illinois v. City of Milwaukee*, Wis., 406 U.S. 91, 107, 92 S.Ct. 1385, 1395, 31 L.Ed.2d (1972) ["While federal law governs, consideration of state standards may be relevant".]

The majority argues that it has not misread the cases it cites because "the cases take the second step. They chose to apply uniform nation-wide rules". Majority opinion, supra (slip opinion at 946), at — n. 21. The issue, however, is *why* federal law was chosen in each of those cases—what specific federal interests dictated that choice. Without analyzing those interests in depth here, see, e. g., notes 8 and 10, *infra*, I do not note that in each of the cited cases the United States was the party condemning *and paying for* the land. In the instant case, a state utility will pay for the land. Surely this is relevant to determining the nature of the interests at stake. See note 11 *infra*.

[7] Friendly, *supra* note 2, at 410. Judge Friendly applied this two-step analysis in *United States v. Certain Property*, 344 F.2d 142 (2nd Cir. 1965):

> Next, says the Government, the question what the United States takes when it files a declaration of taking of real prop-

Friendly in his analysis of *Clearfield Trust:*

> *Clearfield* decided not one issue but two. The first . . . is that the right of the United States to recover for conversion of a Government check is a federal right, so that the courts of the United States may formulate a rule of decision. The second . . . is whether, having this opportunity, the federal courts should adopt a uniform nation-wide rule or should follow state law.[7]

In federal condemnation actions compensation is clearly a federal question. But whether it is resolved by substantive state or federal law presents a choice of law problem no different from any other: the choice "is dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law". *Standard Oil, supra,* 332 U.S. at 309-10, 67 S.Ct. at 1609.[8]

III. Choice of Law Interest Analysis in the Instant Case

Because I view this case as presenting a traditional choice of law question, I think it is highly relevant that the federal eminent domain power here is exercised pursuant to Section 21 and that the United States is not a party to the action. These distinctions significantly col-

---

erty is a question as to which federal courts *may* make an independent determination, free from any requirement . . . to follow state law. We fully agree. Where we break off from the Government is at its third proposition—that the interest in nation-wide uniformity of federal condemnation makes it imperative for federal courts to *use* this freedom to ignore state property law in determining what the United States takes when it takes "real estate". *Id.* at 144 (citations omitted).

[8] *United States v. 93,970 Acres of Land*, 360 U.S. 328, 79 S.Ct. 1193, 3 L.Ed.2d 1275 (1959), supports this view. In that case, the Supreme Court refused to apply a state election of remedies law where the United States sought, in one action, to condemn land and adjudicate the rights of a third party claiming a possessory interest in the land. The state law would have been manifestly unfair to the Government, presenting it with "a Hobson's choice". As the Court noted, "[w]e have often held that *where essential interests of the Federal Government are concerned,* federal law rules unless Congress chooses to make state laws applicable. It is apparent that no such choice has been made here". *Id.* at 332-33, 79 S.Ct. at 1196. [citations omitted]. Thus, the Court did not automatically apply federal law. Rather, it looked to the classic choice of law factors: nature of the federal interest, hostility of the state law, and congressional intent.

or the "specific governmental interests" involved and dictate a choice of law other than that made by the majority.

I agree that the Federal Power Act delegates the full federal power of eminent domain to a licensee under Section 21, but I think the majority is off base in concluding that this full delegation renders irrelevant any distinction between the United States and licensees as parties to a condemnation. Our focus should be directed toward the *interests* of the parties, not toward the degree of delegation. The Act clearly expresses a legislative finding that the United States has a distinct interest, one greater than that of a licensee. Under Section 7(b) of the Act, 16 U.S.C. § 800(b), the Federal Power Commission may not issue a license where it has found that "the development of any water resources for public should be undertaken by the United States itself". *See Udall v. F. P. C.,* 387 U.S. 428, 87 S.Ct. 1712, 19 L.Ed.2d 869 (1967). I thus find persuasive the reasoning of the Ninth Circuit in *Public Utility District No. 1 of Pend Oreille Co. v. City of Seattle,* 382 F.2d 666, 669-70 (9th Cir. 1967), cert. dismissed, 396 U.S. 803, 90 S.Ct. 22, 24 L.Ed.2d 59:[9]

> We first observe that the position of a licensee is distinguishable from that of the United States with respect to furthering the national interest. By issuance of a license the United States is not acting in the national interest through the licensee to the same extent as it would if it undertook the project itself. The United States acts in the public interest on a national scale; the licensee often on a local scale, on projects thought to be of insufficient dimensions to warrant the assertion of national power. In many cases the

---

[9] Although the Ninth Circuit offered this analysis in support of its finding that Section 21 does not delegate full eminent domain power, I cite it here because of its relevance to determining state and federal interests in this case.

> requirements of federal permission and regulation are all that the national interest requires. Frequently the licensee is a privately owned utility or even manufacturer, seeking the license for purposes of profit.

For these reasons, I conclude that a Section 21 condemnation does not involve the same degree of federal interest as a condemnation by the United States itself.[10]

The majority concedes that "[e]ven if a sharp distinction between a licensee and the United States cannot be drawn, it may be that the federal interest in the price paid for licensed hydroelectric plants is less than in other government projects. If so, use of state law would be appropriate . . . .", majority opinion (slip opinion at 948), at——. After weighing the relative state and federal interests, the majority concludes that "[t]he balance tips toward the need for federal law", majority opinion, supra (slip opinion at 950), at ——. Herein lies my second point of departure.

Georgia's interest in having its compensation law applied is manifest. This case involves only Georgia parties

---

[10] The majority contends that simply because "the property will be used privately is not reason enough" to draw a distinction, noting that "[i]n *Miller*, for instance, the United States took land for use by a private railroad", majority opinion (slip opinion at 947), at —. Examination of the facts in *Miller*, however, reveals a significant federal interest in the taking there—an interest which by traditional choice of law standards amply justified the application of federal law. The United States condemned the land in question to allow relocation of private railroad tracks which otherwise would have run directly through an area soon to be flooded by the Central Valley Reclamation Project in California. In 1935, Congress authorized the appropriation of $12,000,000 for this project, construction of which was approved by President Roosevelt in December of that year. In the next two years, Congress appropriated another $19,400,000 for the project. 317 U.S. at 370-71, 63 S.Ct. at 278.

and Georgia land. The state's law of compensation is more favorable to the landowner than is the federal law. As a federal court we are not concerned with the wisdom of that policy; all that is relevant to our consideration is that Georgia has decided how best to serve the interests of its citizens. Absent the fact that the state utility here is exercising a federal power pursuant to a federal statute, this would be a classic case of traditionally and exclusively local concern.

But the majority, in construing the Federal Power Act, finds a "significant conflict" with state law as required by *Wallis:* "federal common law of compensation is the appropriate choice in this case because the use of state law could interfere with achievement of congressional aims", majority opinion, supra (slip opinion at 951), at ——. The majority cites two aims of the statute. Neither, I submit, is threatened by the application of state law.

The majority notes in the first place that the "primary concern" of Congress in passing the Act "was to stimulate private development of America's hydroelectric power resources", majority opinion, supra (slip opinion at 951), at ——. This goal is frustrated in jurisdictions where, as here, the state law of compensation produces a substantially higher award for the landowner. This assumption I view as much too conjectural to afford a basis for application of federal law. The majority admits that the increased cost of the project involved in this case might not substantially interfere with federal goals; it is only when "all the acquisitions for a major project are grouped together, and even more so when many licensed projects are considered as an aggregate", majority opinion, supra (slip opinion at 951), at ——, that the "accompanying chill" on development becomes significant. We have been presented with no data as to such aggregate costs or, for that matter, whether the laws of other states present a similar conflict with federal law. It was precisely this type

of rationale—to remove "obstacles to exploration for development"—which led this Court astray in *McKenna v. Wallis*, 344 F.2d at 441. In reversing the Fifth Circuit, the Supreme Court cautioned that while such a rationale might be "fitting . . . where a State interposes unreasonable conditions . . . it can have no force" where the state law "provides a quite feasible route" to accomplish the immediate goal—in that case, to assign a lease, here, to compute just compensation. 384 U.S. at 70, 86 S.Ct. at 1305.

Secondly, the majority finds a direct federal interest "in minimizing the cost of licensed facilities by applying federal valuation rules", majority opinion, supra (slip opinion at 952), at ——, because under Section 14 of the Act, the federal government has the option to acquire a project at the expiration of a license. 16 U.S.C. § 807. I cannot accept the majority's conclusion that "[u]se of federal compensation standards would reduce the option price and further this congressional desire to make government acquisition a realistic possibility", majority opinion, supra (slip opinion at 952), at ——. Again, we lack the data to conclude that the additional cost imposed under Georgia law would make federal acquisition less than "a realistic possibility". Furthermore, the statute does not clearly mandate inclusion of that extra cost in the federal option price.[11] Of course, we have no way of know-

[11] In defining the option price, the statute provides that the United States "shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken . . ." 16 U.S.C. § 807. Thus, while the concept of "net investment" is affected in the abstract by a higher price paid for a project when state compensation law is applied at the time of licensee acquisition, the statute limits the concept to "the fair value of the property taken . . ." if and when the federal option is exercised. The question here is whether "fair value" is also to be computed on the basis of state law or whether a uniform federal standard should be applied. Arguably, a stronger case for the application of federal law can be made here because there is a direct

ing at this point if the United States ever will exercise its option at all. At best, then, the effect on the fiscal interests of the United States is highly speculative.[12] When this court evinced similar solicitude for the federal fisc in *Miree v. DeKalb County, Ga., supra*, the Supreme Court reversed because "the resolution of petitioners (sic) breach of contract claim against respondent will have no *direct* effect upon the United States or its Treasury". —— U.S. at ——, 97 S.Ct. at 2494.

Finally, there is a single, telling argument which effectively refutes the majority's reading of congressional intent. In finding that "Congress did not believe it necessary to follow state eminent domain rules or desire courts to do so," majority opinion, supra (slip opinion at 943), at ——, the majority overlooks the fact that Congress left up to the licensee whether to acquire land through a Section 21 action or a state condemnation. The majority admits: "If a licensee brought a *state* condemnation action in state court, state law would govern.", majority opinion,

federal interest: the federal government is paying out of its own funds to acquire the project. Whether this is the construction of Section 14 that will ultimately prevail I do not forecast. These problems of interpretation are raised only to stress that whether the price paid by a state party in a Section 21 condemnation will affect the price later paid by the federal government in exercising its option under Section 14 is by no means certain.

[12] In *Grand River Dam Authority v. Grand-Hydro*, 335 U.S. 359, 69 S.Ct. 114, 93 L.Ed. 64 (1948), petitioner argued that because of the strong federal interest, the Oklahoma Supreme Court was required to apply federal law in an eminent domain action by a state agency to condemn land for a power site. The Court rejected this argument. Petitioner raised, inter alia, the fact that the United States had an option to acquire the project after the license expired. The Court responded: "Such a recapture of the project is even more remote than a determination of a rate base. . . . We accordingly express no opinion upon the issues which may arise when, as and if the above-mentioned proceedings may be taken". *Id.* at 375, 69 S.Ct. at 122.

supra (slip opinion at 953), at ——. It is well established that "under this Act . . . the condemnor has an election to exercise the power of eminent domain either under the specified enumerations of the Federal Power Act or under" the law of the state. *Oakland Club v. South Carolina Public Service A.*, 110 F.2d 84, 86 (4th Cir. 1940), cited with approval in *Chapman v. Public Utility District No. 1*, 367 F.2d 163, 167 (9th Cir. 1963). This Circuit has recognized that the state eminent domain power is "separate and distinct" from that granted a licensee under a federal statute analogous to Section 21. *Robinson v. Transcontinental Gas Pipe Line Corp.*, 421 F.2d 1397, 1398 (5th Cir. 1970). Congress' commerce power is plenary. Presumably, if Congress could *forbid* the construction of hydroelectric facilities using navigable waters without a license granted by the FPC, 16 U.S.C. § 817,[13] it could have required application of federal law in *any* condemnation to secure land for purposes of building such facilities. That it did not do is significant.[14]

[13] "The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government. . . . [T]he plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. It may likewise grant the privilege on terms. It is no objection to the terms and to the exertion of the power that "its exercise is attended by the same incidents which attend the exercise of the police power of the states.' The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment". *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 426-27, 61 S.Ct. 291, 308, 85 L.Ed. 243 (1940). This passage casts doubt on the majority's statement that "it is not certain that Congress had the power to compel such uniformity". Majority opinion, supra (slip opinion at 943), at — n. 16.

[14] "As to the question whether the Federal Power Act should be interpreted as actually superseding the state law of condemnation and as restricting the measure of valuation which lawfully may be used by the courts of Oklahoma in a condemnation action for the acquisition of land for power site purposes by an agency of

Rather, "[i]n the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the states from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act". *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 167, 66 S.Ct. 906, 913, 90 L.Ed. 1143 (1946). "The Act leaves to the states their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce". *Id.* at 171, 66 S.Ct. at 915. Congress was careful not to cast the regulation of hydroelectric plants in an entirely federal mold; it decided to leave many of the incidents of regulation to the states.[15] The legislative history shows no concern by Congress over whether licensees pay for condemned land according to state or federal rules of compensation. Congress had—but failed to exercise—the power to assure application of a uniform, *federal* standard in *any* exercise of eminent domain power, state or federal, to acquire land on which to build these federally regulated facilities. Against this background, I cannot concur in the majority's exotic interpretations of an intent that Congress surely never had.

IV. Conclusions

In sum, I do not dispute that there is a great national interest in promoting the development of domestic sources

that State, there is nothing in the Federal Power Act to indicate that an attempt has been made by Congress to make such a nation-wide change in state laws". *Grand River Dam Authority v. Grand-Hydro*, 335 U.S. 359, 374, 69 S.Ct. 114, 121, 93 L.Ed. 64 (1948).

[15] "The resulting integration of the respective jurisdictions of the state and Federal Governments, is illustrated by the careful preservation of the separate interests of the states throughout the Act, without setting up a divided authority over any one subject". *First Iowa Hydro-Elec. Coop., supra*, 328 U.S. at 174, 66 S.Ct. at 916.

of energy. But it is for Congress, in the first instance, to say how this interest is to be achieved. Where the federal regulatory scheme comes in conflict with state law and thus with a state interest, we need some affirmative indication that Congress intended the federal common law to govern before we go about displacing state law. Such an indication might be inferred from the mere presence of a conflict significant in that it substantially impedes achievement of federal aims. Otherwise, we are to presume that Congress felt the national interest adequately served by application of state law.

I do not think it can fairly be said that Congress intended the result reached by the majority. Failing that, we are left to analyze the respective federal and state interests in determining which law to apply. Against clear, substantial and immediate state interests we are met with only speculative, attenuated national concerns and offered no persuasive arguments as to why the Georgia law of compensation is unreasonable or inadequate to achieve the broad goals of the Federal Power Act. I conclude that "the application of federal common law to resolve the issue presented in this case would promote no federal interests even approaching the magnitude of those found in *Clearfield*", *Miree, supra,* —— U.S. at ——, 97 S.Ct. at 2493. Thus, there is no "significant conflict". Georgia's law should be applied.

To put it simply: We had to make a choice of law, but I am convinced that the majority has made the wrong choice.

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-4448

D.C. Docket No. CA 74-171 MAC

GEORGIA POWER COMPANY, Plaintiff-Appellee,

v.

54.20 ACRES OF LAND, situated lying and being LAND LOTS 315 AND 326 OF the 3RD LAND DISTRICT, etc., et al., Defendants,

Jim Dodson and Patricia W. Womack, Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Georgia

Before WISDOM, SIMPSON and TJOFLAT, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

November 28, 1977

SIMPSON, Circuit Judge, dissenting.

ISSUED AS MANDATE:

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ [illegible]
Deputy

New Orleans, Louisiana

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1327

D. C. Docket No. CA-75-55-ATH

J. C. HILSMAN, ET AL.,
Plaintiffs-Appellants,

versus

GEORGIA POWER COMPANY,
Defendant-Appellee.

Appeals from the United States District Court for the Middle District of Georgia

Before WISDOM, SIMPSON and TJOFLAT, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that the plaintiffs-appellants pay to defendant-appellee, the cost on appeal to be taxed by the Clerk of this Court.

November 28, 1977

ISSUED AS MANDATE:

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

March 31, 1978

EDWARD W. WADSWORTH
CLERK

TEL 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

TO ALL PARTIES LISTED BELOW:

No. 75-4448 & 77-1327—GA. POWER CO. v. 54.20 ACRES OF LAND, JIM DODSON, ET AL.; J. C. HILSMAN, ET AL. v. GA. POWER CO.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing,* and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition(s) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk
/s/ By BRENDA M. HAUCK
Deputy Clerk

* on behalf of appellants

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

GEORGIA POWER COMPANY, *Plaintiff*

v.

54.20 ACRES OF LAND, SITUATE, LYING AND BEING IN LAND LOTS 315 AND 326 OF THE THIRD LAND DISTRICT, 389TH G. M. DISTRICT OF BALDWIN COUNTY, GEORGIA,

AND

JIM DODSON, ET AL, *Defendants*

Civil Action No. 74-171 MAC

Nov. 11, 1975

JUDGMENT CONFIRMING REPORT OF COMMISSION

The motion of Georgia Power Company to confirm the Commission's report which was filed April 8, 1975, having been read and presented, and objections having been filed thereto by defendants Jim Dodson and Patricia W. Wommack,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

(1) Jim Dodson and Patricia W. Wommack to whom he conveyed his interest in the property involved during the pendency of these proceedings did file their objections to the report of the Commission and to judgment confirming said report on the ground that "the applicable law to determine compensation in this proceeding is the law of Georgia, which prohibits the offset of benefits against land value". Said objections have been carefully considered on briefs submitted and are hereby found and determined to be without validity.

(2) Said report of the Commission is confirmed in all respects, and the findings of fact and conclusions of the

Commission are hereby adopted as the findings and conclusions of the Court.

(3) The defendants are not entitled to any compensation for the property taken in this proceeding because the enhancement in value of the remainder as a result of the Lake Wallace Project exceeds the value of the entire tract before the taking.

(4) Upon entry of this order, Georgia Power Company will be the owner in fee simple of Tracts Nos. P23A-1 and P23A-2 in Putnam County, Georgia, as more particularly described by metes and bounds in Exhibit A hereto attached and set forth and delineated on the Plat hereto attached as Exhibit B.

(5) The plaintiff shall be taxed with all costs.

Dated at Macon, Georgia, this 11 day of November, 1975.

/s/ W. A. BOOTLE

W. A. Bootle, Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

• • • • • • • • • • •

GEORGIA POWER COMPANY, *Petitioner*

v.

54.30 ACRES OF LAND IN PUTNAM COUNTY, GEORGIA,

AND

JIM DODSON, ET AL., *Defendants*

Civil Action No. 74-171-MAC

• • • • • • • • • • •

GEORGIA POWER COMPANY, *Petitioner*

v.

377.61 ACRES OF LAND IN PUTNAM COUNTY, GEORGIA

AND

MRS. NELLIE W. LARMAN, ET AL., *Defendants*

Civil Action No. 74-174-MAC

• • • • • • • • • • •

February 13, 1975

INSTRUCTIONS TO COMMISSIONERS

INTRODUCTION

Instruction No. 1

You have been selected to serve on a commission, appointed by this Court in accordance with the provisions of Rule 71A, Federal Rules of Civil Procedure, to determine the question of just compensation which the Georgia Power

Company should pay to the condemnees for the taking of their properties or interests therein being condemned. The right of Georgia Power Company to take the land in question is not before you. This is for determination by the Court alone. These instructions are to assist and guide you in the performance of your duties. Attached to the complaints are plats of the various tracts of land and descriptions of the estates being taken therein that will aid you in your consideration of just compensation to be paid for the respective tracts. It is my duty, as the Judge of this Court, to instruct you concerning the law which is to be applied, and it is your duty, as commissioners, to follow the law as stated in the instructions which I am giving you and to apply them to the facts as you find them from the evidence before you. You are not to single out any one instruction, alone, as stating the law, but must consider the instructions I shall give you as a whole. What I, as the Judge, declare to be the law of the case is binding upon you, and, under your oath as commissioners, and regardless of any opinion you may have as to what the law ought to be, it must be accepted by you. It would be a violation of your sworn duty to base a finding upon any other view of the law than that given you in the instructions of the Court. On the other hand, the determination of questions of fact is solely your province, and in this case the ultimate issue of fact to be determined by you is the just and adequate compensation to be paid the owner of the land involved.

POWERS OF THE COMMISSION

Instruction No. 2

In determining the amount of just compensation which the Georgia Power Company should pay to the condemnees, there are certain rules that you should follow. It is not contemplated, however, that these instructions will cover all of your duties nor touch upon all matters of procedure. As provided in Rule 71A(h) of the Federal Rules of Civil Procedure, in performing your duties you shall have the

powers of a Master as provided in Rule 53(c) of said Rules, and proceedings before you shall be governed by the provisions of Rule 53(d) (1) and (2) of said Rule, to all of which you should refer. Your action and report shall be determined by a majority.

• • • • • • • • • •

OPENING STATEMENTS, ORDER OF TESTIMONY AND CLOSING STATEMENTS

Instruction No. 7

The owners of the property being condemned have the burden of proof as to its value, explained more fully in a specific instruction, hence counsel for the owners shall make the first opening statement to you and present their evidence of value first. The opening statement is a means whereby counsel explains to you what they expect to prove. The Company may make its opening statement following the opening statement of the property owners, or if there are a number of tracts, the company may make its opening statement after the attorneys for the landowners have presented evidence as to the valuation of the several tracts involved. In all events the company presents its evidence as to valuation after presentation of the landowner(s) evidence.

Following the presentation of the company's case, the owners will then be afforded an opportunity at rebuttal. By established procedure, the company will not be afforded such an opportunity because it has already had that opportunity to rebut when it presents its case in chief. The owner is restricted in rebuttal, however, to rebutting the matter presented by the company but will not be permitted to go into anything considered new matter or a reopening of its case in chief.

Following the closing of all the evidence in the case, the owners will present closing argument, followed by closing argument by the company. The owners will then be

accorded an opportunity to rebut the argument made by the company. There is no rebuttal argument by the company because the company has had its opportunity of rebuttal.

POWER OF EMINENT DOMAIN

Instruction No. 8

This proceeding by the Georgia Power Company is one in Eminent Domain. In order that privately owned property may not stand in the way of, and perhaps prevent, public improvement of certain kinds, the United States has reserved to itself the right to take such privately owned property for such public use and purposes and in certain instances such as the case before you has delegated the use of this power to private corporations when its use is in the public interest. This is what is known as "right of eminent domain", and the proceedings by means of which the property is thus taken are known as "condemnation proceedings". The right to acquire property by such proceedings is inherent in the United States and is a power essential to its independent existence. All persons hold property subject to the exercise by the United States or its delegates such as Georgia Power Company in this case of this essential sovereign power, for without that power any person having an interest in the property to be acquired could delay or even prevent the public use or improvement of the property by refusing to sell for public purposes such as in this case or could compel the payment for such public puroses of a price in excess of their fair market value of the property.

By this method Georgia Power Company is acquiring, for public uses and purposes, the interests which have been set forth in the complaint.

The exercise of this power is, however, subject to the requirement of the Fifth Amendment to the Constitution that payment of just compensation shall be made to the persons entitled thereto.

You are instructed that in these cases the date of taking is the date on which your hearings are held. (United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 76, 33 S. Ct. 667, 677).

It is the purpose of this proceeding, and your duty as commissioners to determine this just compensation or fair market value.

You will be given other instructions as to the definition of the term "just compensation".

JUST COMPENSATION TO CONDEMNOR AS WELL AS DEFENDANTS

Instruction No. 9

You are instructed that just compensation means a compensation that is just to Georgia Power Company and its consumers as well as to the individual owner of the land being condemned for public purposes.

It would be unjust to the public if Georgia Power Company were required to pay owners more than fair market value for the acquisition of property for the general good. It would be unjust to the owners if they were to be paid less than fair market value.

Plaintiff is entitled to the same fair and unbiased treatment at your hands as if it were a private individual, and the fact that it might be able to pay a greater sum for these properties than a private individual must not be permitted to affect your verdict.

At all times in these proceedings you should keep in mind that the landowners are to be put in as good a position pecuniarily as if their property had not been taken. (Searl v. School District No. 2, 133 U.S. 553, 562, 10 S. Ct. 374, 377; Bauman v. Ross, 167 U.S. 548, 574, 17 S. Ct. 966, 976).

• • • • • • • • • • •

BURDEN OF PROOF

Instruction No. 11

The burden of proof in condemnation proceedings is upon a defendant landowner to establish a value as just compensation for the property taken from him. In order for a defendant to successfully carry the burden of proof, it is necessary that defendant establish a value as just compensation by a preponderance of the evidence. This means such evidence as, when weighed with that opposed to it, has more convincing force and from which it results that the greater probability of truth lies therein. However, preponderance of the evidence does not require demonstration of absolute certainty, and it is proper to find that a party has succeeded in carrying his burden of proof on an issue of fact if the evidence favoring his side of the question is more convincing than that tending to support the contrary side, and if it causes you to believe that the probability of truth favors that party on that issue.

This burden of proof rule merely means on the issue of fair market value that, if the evidence is evenly balanced, defendant has failed to sustain his claims as to the amount of compensation to which it is entitled, and you shall find such amount of just compensation as has been established by the preponderance of the evidence of the Georgia Power Company or the defendant as it shall be found by you. (United States ex rel. TVA v. Powelson, 319 U.S. 266, 273 (1943); U.S. v. Evans, 380 F. 2d 761; Wilson v. U.S., 350 F. 2d 901).

COMPETENT EVIDENCE OF VALUE

Instruction No. 12

There are three basic methods or approaches used by expert appraisers in arriving at fair market value, and these are commonly referred to as market, income and cost.

The best method of arriving at the fair market value is the market approach (U.S. v. Leavell & Ponder, Inc., 286 F. 2d 398; U.S. v. 2,872.88 Acres of Land, 310 F. 2d 775), and where there is ample market data available in the form of comparable sales, you shall not base your findings of fair market value on the more speculative and less reliable cost and income approaches.

The market approach involves the consideration of the same or similar properties in the vicinity in the open market reasonably near in time to the date of taking. Generally, a sale in the open market of the property in question which is not influenced by the presence of the project is the best evidence of its fair market value. Lacking such a transaction, sales on the open market of similar or comparable property in the vicinity reasonably near in time to the date of taking are the best evidence of the fair market value of the property being acquired. In comparing similar sales you shall not rely on any forced sales (Hickey v. United States, 208 F. 2d 269) or any sales which reflect enhancement due to the construction of the project. (United States v. Miller, 317 U.S. 369, 63 S. Ct. 276).

Of course there will be differences in the size, shape, location and immediate surroundings of two pieces of property and perhaps differences in other respects as well, but to the extent they are similar or comparable, the price for which one sold on the open market is the best evidence of the fair market value of the other.

"Similar" does not mean "identical" but having a resemblance. Obviously, no two properties are alike in every respect, but this does not prevent their being comparable. The extent of the comparability of the other sales and the weight to be given them and the weight to be given the sale of the subject property at the date of taking, however, are for you to determine.

• • • • • • • • • •

FAIR MARKET VALUE

Instruction No. 18

By fair market value is meant that sum of money which could have been obtained for the property on the open market on the date of taking, that is, what the property would sell for in cash, or on terms of reasonable credit equivalent to cash, by one who is willing but is not obliged to sell, to one who desires but is not obliged to buy.

Fair market value may be defined as the highest price estimated in terms of money which the land will bring if exposed for sale in the open market, with a reasonable time allowed to find a purchaser buying with knowledge of all the uses and services to which the land is best adapted, and for which it is then capable of being used, the seller being desirous of selling; but under no particular urgent necessity for doing so; and the purchaser being desirous of purchasing but under no particular or urgent necessity of purchasing.

In determining the actual market value of the land involved in these proceedings, you may consider its location and environment and the character and nature of the developments surrounding it, its physical characteristics, its accessibility or the lack thereof, and any and all physical factors that might in any way affect its adaptability and therefore its value on the market.

The statement that no private property shall be appropriated for public use unless full and equivalent value is returned to the owner expresses the scope of the definition of just compensation. That equivalent is the market value of the property at the time of taking contemporaneously paid in money or its equivalent. The owner is entitled to be put in as good condition from a pecunicary standpoint as if his property had not been taken. He must be made whole, but he is not entitled to more. It is the property and not the cost of it that is safeguarded by the law.

Just compensation includes all elements of value that inhere in the property, but it must not exceed the market value. It may be more or less than the owners investment. Its value may have changed substantially while held by him. It may be proved to have been profitable or unprofitable, but in the last analysis the sole and only fact that you are to determine in fixing the amount to be paid by the company is what is its value in exchange for money paid contemporaneously at the time of the taking by the Georgia Power Company. (United States v. Reynolds, 397 U.S. 14, 16, 90 S. Ct. 803, 805; Surfside of Brevard, Inc. v. United States, 414 F. 2d 915).

HIGHEST AND BEST USE

Instruction No. 19

In fixing the fair market value of the lands in question you should consider the highest and best use to which they were adaptable at the time of the taking or in the reasonably near future thereafter; you should not allow speculation, fancy, unreasonable hypothesis or mere conjecture to enter into or to influence such consideration.

The highest and best use which you may consider is that which the credible evidence shows was probable in the reasonably near future. Mere possibility of such use or adaptation is not enough; the possibility of such adaptation and use must be real, reasonably impending, and for which there is a demand, all considerable enough to influence the fair market value of the land in the condition and state in which it was on its date of valuation; nor is mere geographical or physical adaptability enough.

Compensation is to be determined by reference to uses for which the property was suitable, having regard to the existing wants of the community then, or such as may have been reasonably expected in the reasonably near future thereafter. Merely possible or imaginary uses or speculative schemes of the owner or witnesses are to be excluded.

In other words, it is not proper to consider what use the owner intended to put the property, nor the plans he had for its improvement, as these are too remote and speculative.

If you find and believe from the evidence that any of the witnesses have based their opinions as to fair market value upon assumed or potential uses which, while within the realm of possibility, are not fairly shown to be reasonably probable, you should disregard and exclude their testimony from your consideration to the extent you find and believe such witnesses were influenced thereby. (Olson v. United States, 292 U.S. 246, 255, 54 S. Ct. 704; Cameron Development Co. v. U.S., 145 F. 2d 209).

ENHANCEMENT

Instruction No. 20

Georgia Power Company in this case is not required to pay any increase in value of the property which was caused by reason of its project. The defendants in this case are entitled to have considered, however, general rises in market prices, if any, not related to or caused by the company project, as proven be comparable sales. But, it is not fair that Georgia Power Company be required to pay the enhanced price, if any, which its project alone has created. Such enhancement reflects elements of value that were created by the company's need for the particular property. It does not reflect what a willing buyer would have paid in cash or its equivalent to a willing seller in a fair and open market in the absence of the project. Thus you will exclude from all consideration any value to any land attributed thereto because of the project and will totally disregard any sales of property where the sales price is enhanced or increased because of the company project. (United States v. Reynolds, 397 U.S. 14, 16-18; U.S. v. Miller, 317 U.S. 369, 63 S. Ct. 276; Olson v. U.S., 292 U.S. 246, 54 S. Ct. 704; Kerr v. South Park Commissioners, 117 U.S. 379, 6 S. Ct. 801; International Paper Co. v. U.S., 227 F. 2d 201 209).

BENEFITS

Instruction No. 21

You are further instructed that when the Georgia Power Company takes land, as in this case, by Eminent Domain, it will be required to pay just compensation for such property. This does not mean, however, that the compensation must necessarily be paid in cash. Compensation, under the Federal Law, which is applicable to these proceedings, can be paid in benefits derived by the landowners if such benefits will place the landowner in as good a pecuniary position as he was before the condemnation proceeding.

That is to say, that when the remainder of the landowner's tract of land, from which part is taken by the project, increases in value by the public improvement, the increase in value offsets the owner's recovery for land taken. You, sitting as a commission in this case, are bound to deduct the value of the remainder from the value of the entire property before taking and to include in the value of the remainder any value arising from the company's project in determining the just compensation to be paid in this cause of action.

In some situations, the value of the remainder may equal or be greater than the entire property before the taking. If that be the case, the landowner has been compensated by the increased value of his remaining lands and would be entitled to no further recompense. (Bauman v. Ross, 167 U.S. 548; Chesapeake v. Ohio Canal Co. v. Key, 5 Fed. Cases, No. 2649; Aaronson v. U.S., 79 F. 2d 139; U.S. v. Trout, 386 F. 2d 216; U.S. v. 901.89 Acres of Land, 436 F.2d 395).

PARTIAL TAKING—FEE

Instruction No. 22

Where the property which has been taken is only a portion of a larger single tract or several contiguous tracts of

land belonging to the same owner, he is entitled to compensation for the fair market value of the property actually taken and, in addition thereto, for the dimunition, if any, in the fair market value of the remainder of the property. (Such dimunition in value of the remainder, if it exists, sometimes is referred to as "severance damage".) Accordingly, you first must determine the fair market value, as of the date of the hearing thereon, of the entire tract or contiguous tracts of land of which the portion taken was a part, in the light of the highest and best use at that time of the entire tract or tracts of land as a single unit without any enhancement in value thereto because of the company project. You next must determine the fair market value, immediately after the taking, of the remainder of the tract not taken, bearing in mind that the highest and best use of the remainder after taking may not be the same as the highest and best use of the entire tract before the taking and further that the remainder may be specially and directly benefitted and enhanced in value by the presence of the project and if so you must include such value in the remainder. The difference between these two figures is the just compensation for that part of his property which has been taken and for the dimunition in value of the remainder of his property, if any. If the value of the remainder after the taking equals or exceeds the value of the whole before the taking there shall be no money awards to the landowner. (U.S. v. Trout, 386 F. 2d 216; U.S. v. 901.89 Acres of Land, 436 F. 2d 395).

CONSEQUENTIAL LOSSES

Instruction No. 23

The commission is instructed that no consideration shall be given to nor allowance of compensation made for either (1) any unwillingness of the landowners to part with their land, or (2) any frustration of the personal plans of the landowners, or (3) any opportunities the landowners may

have lost by reason of the taking of this interest in their land. (U.S. v. Petty Motor Co., 327 U.S. 372, 377, 66 S. Ct. 596, 599).

• • • • • • • • • • •

Costs

Instruction No. 28

In determining the amount of just compensation which the defendant is entitled to receive, you will not take into consideration the cost of these proceedings, including attorney fees, since attorney's fees and expenses are not embraced within the concept of just compensation. (United States v. 2,353.28 Acres of Land, 414 F. 2d 965, 972).

• • • • • • • • • • •

This 13 day of February, 1975.

/s/ W. A. Bootle
Senior U.S. District Judge

[Title Omitted in Printing]

• • • • • • • • • • •

April 30, 1975

Amended and Supplemental
Instructions to Commissioners

You are hereby instructed to substitute the attached new Instructions Nos. 8, 19, and 21 in place of the original Instructions Nos. 8, 19, and 21 given you on February 13, 1975, and to add new Instructions 21a and 22a.

So Ordered this 30th day of April, 1975.

/s/ W. A. Bootle
Senior U.S. District Judge

Power of Eminent Domain

Instruction No. 8

This proceeding by the Georgia Power Company is one in Eminent Domain. In order that privately owned property may not stand in the way of, and perhaps prevent, public improvement of certain kinds, the United States has reserved to itself the right to take such privately owned property for such public use and purposes and in certain instances such as the case before you has delegated the use of this power to private corporations when its use is in the public interest. This is what is known as "right of eminent domain", and the proceedings by means of which the property is thus taken are known as "condemnation proceedings". The right to acquire property by such proceedings is inherent in the United States and is a power essential to its independent existence. All persons hold property subject to the exercise by the United States or its delegates such as Georgia Power Company in this case of this essential sovereign power, for without that power any person having an interest in the property to be acquired could

delay or even prevent the public use or improvement of the property by refusing to sell for public purposes such as in this case or could compel the payment for such public purposes of a price in excess of the fair market value of the property.

By this method Georgia Power Company is acquiring, for public uses and purposes, the interests which have been set forth in the complaint.

The exercise of this power is, however, subject to the requirement of the Fifth Amendment to the Constitution that payment of just compensation shall be made to the persons entitled thereto.

In determining the amount of just compensation to be paid by the Georgia Power Company to these condemnees, you are to determine value as of the date of taking. You are instructed that insofar as your determination of value is concerned, you are to consider the date of your hearings as the date of taking.

It is the purpose of this proceeding, and your duty as commissioners to determine this just compensation or fair market value.

You will be given other instructions as to the definition of the term "just compensation".

• • • • • • • • • •

HIGHEST AND BEST USE

Instruction No. 19

In fixing the fair market value of the lands in question you should consider the highest and best use to which they were adaptable at the time of taking or in the reasonably near future thereafter; provided in arriving at the before value you will not attribute any element of value thereto for the project or as a result of the project. You should not allow speculation, fancy, unreasonable hypotheses or mere conjecture to enter into or to influence such consideration.

The highest and best use which you may consider is that which the credible evidence shows was probable in the reasonably near future. Mere possibility of such use or adaptation is not enough; the possibility of such adaptation and use must be real, reasonably impending, and for which there is a demand, all considerable enough to influence the fair market value of the land in the condition and state in which it was on its date of valuation; nor is mere geographical or physical adaptability enough.

Compensation is to be determined by reference to the use (or uses if you find separate parts of one tract may have different uses) for which the property was suitable, having regard to the existing wants of the community then, or such as may have been reasonably expected in the reasonably near future thereafter. Mere possible or imaginary uses or speculative schemes of the owner or witnesses are to be excluded.

In arriving at the before value, it is not proper to consider solely to what use the owner intended to put the property, nor the undeveloped plans he had for its improvement, as these may be too remote and speculative.

If you find and believe from the evidence that any of the witnesses have based their opinions as to fair market value upon assumed or potential uses which, while within the realm of possibility, are not fairly shown to be reasonably probable, you should disregard and exclude their testimony from your consideration to the extent you find and believe such witnesses were influenced thereby.

The fair market value of the entire tract does not necessarily depend upon the uses to which the landowner has devoted his or her land, but is to be arrived at upon just consideration of all uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the

measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. However, under Federal law, you are not to attribute any element of value thereto for the project or as a result of the project.

In respect of each item of property the fair market value of the entire tract may be deemed to be the sum which, considering all the circumstances, could have been obtained for it at the date of valuation; that is, the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy. In making that estimate there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining. The inquiry in such cases must be what is the property worth in the market, viewed not merely with the reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted.

To the extent a particular use is so speculative, fanciful, or unreasonable that it would not be given consideration in the bargaining between an owner willing to sell and a purchaser desiring to buy, you may not allow consideration of this use to enter into or influence your determinations. However, all considerations that might fairly be brought forward and given substantial weight in bargaining between an owner willing to sell and a purchaser desiring to buy should be considered and taken into account.

In considering the highest and best use of the lands, you may find that the highest and best use of a particular parcel is one thing, while another portion of the lands is best suitable for a different use. Thus, you may consider an integrated system of compatible uses with different uses being applied to various parcels of the land.

BENEFITS

Instruction No. 21

You are further instructed that when the Georgia Power Company takes land, as in this case, by Eminent Domain, it will be required to pay just compensation for such property. This does not mean, however, that the compensation must necessarily be paid in cash. Compensation under the Federal Constitution, which is applicable to these proceedings, can be paid in benefits derived by the landowners if such benefits will place the landowner in as good a pecuniary position as he was before the condemnation proceeding.

That is to say, that when the remainder of the landowner's tract of land, from which the part is taken by the project, increases in value by the public improvement, the increase in value offsets the owner's recovery for land taken. You, sitting as a commission in this case, are bound to deduct the value of the remainder from the value of the entire property before taking and to include in the value of the remainder any value arising from the company's project in determining the just compensation to be paid in this case.

In some situations, the value of the remainder may equal or exceed the value of the entire property before the taking. If that be the case, the landowner has been compensated by the increased value of his remaining lands and would be entitled to no further recompense.

Two types of benefits may result from a public improvement such as involved here, namely general and special benefits. You may not consider any increase in value because of general benefits, but you are obliged to consider any increase, if there be any, due to special benefits. General benefits are those which result not only to the property of the defendant landowner, but also to property in the entire community generally. Special benefits are those which accrue specially to the parcels of land involved in these cases; that is to say, benefits which are connected with the

ownership, use and enjoyment of a particular parcel or tract of land. Special benefits, however, do not become general benefits merely because other tracts in the vicinity are similarly benefited.

In determining the fair market value of the remainder of the landowner's tract of land, you are to use an approach like that used in determining the fair market value of the entire tract, with certain exceptions as set forth below. In determining the fair market value of the remainder you are to again focus on the date of valuation, and determine the amount that in all probability would be arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy. In making that estimate you are to take the vantage point of the date of valuation and take into account all cosiderations that fairly might be brought forward on that date and reasonably be given substantial weight on that date in such a hypothetical bargaining.

Once again, you are to consider the highest and most profitable use for which the remainder is adaptable and needed or likely to be needed in the reasonably near future, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value of the remainder.

As when valuing the entire tract, to the extent a particular use is so speculative, fanciful, or unreasonable that it would not be given consideration in the bargaining between an owner willing to sell and a purchaser desiring to buy, you may not allow consideration of this use to enter into or influence your decision.

Unlike the valuing of the entire tract, when you are determining the value of the remainder of the lands you may, under proper circumstances, consider the existence of the project, to the extent set forth in the following paragraph of this instruction. In determining the propriety of considering those uses arising from the existence of the project, you may entertain evidence tending to show the likelihood

of the completion of the project and also evidence indicating how much time will elapse before such uses could arise. With this evidence in mind, you must determine whether such uses as lakeshore development or other uses depending on the project's existence would be given consideration in the hypothetical bargain on the date of valuation between a willing seller and purchaser. If you determine, that such considerations would fairly be brought forward and given substantial weight in a bargain on the date of valuation, then you may consider such uses—but only to the extent they would or should affect a bargain which was struck on the date of valuation.

Two types of benefits may result from a public improvement such as that involved here, namely general benefits and special and direct benefits. You may not consider any increase in value because of general benefits, but you should, under the guidance of the above paragraph of this instruction, consider any increase, if there be any, in value due to special and direct benefits. General benefits are those which result not only to the property of the defendant landowner, but also to property in the entire area generally. General benefits, for example, are those which come from sharing the common advantage and convenience of increased public facilities, and the general advance in value of real estate in the vicinity by reason thereof. These benefits are not to be considered in any event. Special and direct benefits are those which arise from the unique relationship of the land to the public improvement. These should be considered if they exist under the circumstances and to the extent described in the paragraph next above of this instruction. And, again, special benefits do not become general benefits merely because other tracts in the vicinity are similarly benefited.

DAMAGES

Instruction No. 21a

Where the property condemned constitutes only a part of an owner's land, the owner is entitled to just compensation, not only for the fair market value of the land actually taken, but also such additional amount as will be equivalent to the diminution or lowering, if any, of the fair market value of the owner's land which was not taken, due to the severance therefrom of the part which was taken.

One method used by some courts for computing these damages involves a calculation of the value of the part taken plus damages to the remainder. Use of this formula requires the trier of fact to calculate separately any dimunition in the value of the remainder which results from the taking. This generally includes all present or prospective damages that naturally and proximately result from the taking and can include such things as dimunition caused (1) by severence from the parcel taken, and (2) by reason of the proposed use of the part condemned.

However, in these cases you are instructed (Instruction No. 22) to use the before-after method to arrive at just compensation; that is, the difference in the fair market value of the whole tract before the taking and the fair market value of what remains after the taking. Under this formula damages sustained by the owner for land taken and damages to the remainder are not segregated but are treated as a unit. The separate items of damages to the remainder may be considered not as specific items of loss, but merely with respect to their effect upon the market value of the remainder. The after value may not be determined simply by deducting the aggregate of all damages from the before value.

• • • • • • • • • •

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

GEORGIA POWER COMPANY, *Plaintiff*

v.

1935.04 ACRES OF LAND IN MORGAN AND GREENE COUNTIES, GEORGIA,
AND
ROBERT J. MCCAMY, ET AL., and UNKNOWN OWNERS, *Defendants*

CIVIL ACTION NO. 75-55-ATH

March 31, 1976

ORDER

The above captioned case is a civil action to condemn real property for use by the plaintiff in connection with its Wallace Dam Project which has been licensed by the Federal Power Commission as Project 2413. The plaintiff has heretofore filed 16 other civil actions to condemn land for this Project. The Court has determined with regard to the earlier cases that because of the character, location and quantity of property involved, just compensation in those cases should be determined by a Commission of three persons as provided in Rule 71A(h) of the Federal Rules of Civil Procedure. In addition, the Court has passed certain orders and given instructions to the Commission with regard to the conduct of their hearings and making their awards in those matters. The within case is a continuation of the previous cases, and the Court has determined that these cases should be handled in the same manner.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that the following Orders entered in the first group of these cases (copies of which are attached hereto) are made ap-

plicable in the within matter the same as if fully repeated and set forth herein:

(a) Order dated October 5, 1974 determining the scope of the Project;

(b) Order dated February 13, 1975 appointing John M. Hancock, Thad E. Murphey and Marion W. Patton to act as Commissioners in accordance with Rule 71A(h);

(c) Order dated February 13, 1975 giving instructions to the Commissioners;

(d) Order dated April 30, 1975 amending and supplementing the instructions to the Commissioners.

Copies of this Order with attachments shall be served by the plaintiff on all parties in this case who have filed an answer or appearance, with the exception of the parties involved with those parcels which have heretofore been settled.

Dated at Macon, Georgia, this 31 day of March, 1976.

/s/ W. A. BOOTLE
W. A. Bootle
Senior U.S. District Judge

[TITLE OMITTED IN PRINTING]

. . . . . .

July 1, 1976

ORDER

This case having come on before the Court for a pretrial hearing on all outstanding motions, requested instructions, defenses, and other matters, and the Court being fully appraised herein;

IT IS THEREFORE ORDERED AND ADJUDGED as follows:

. . . . . .

4.

All of the defendants have asserted by way of defense that substantive rules of Georgia Condemnation Law should be applied by the tryer of fact in this case to determine the measure of just compensation to be awarded for the taking of the defendants' property, and have requested the Court to revise the instructions heretofore given the Commission on March 31, 1976, which charge the Federal Rules of Law with regard to determination of just compensation. The Court adheres to its previous order dated March 31, 1976 wherein Federal law is made applicable to the question of just compensation in this case, and all such defenses, motions and requests to amend the instructions are hereby overruled.

5.

Several of the defendants have filed a demand for jury trial in this case. The Court adheres to its previous ruling of March 31, 1976, that because of the character, location and quantity of property involved in this and other cases in the Lake Wallace project, just compensation shall be determined by a commission of three persons as provided in

Rule 71A(h) of the Federal Rules of Civil Procedure, and all demands for jury trial are overruled.

• • • • • • • • • • •

7.

In addition to the general findings and orders set forth above, the Court makes the following orders with regard to each particular defendant involved in this case:

(a) A. James Elliott, et. al., Parcel M-68—The defenses raised in paragraphs 2 and 3 of the First Defense fail to state a legal defense to the claims set forth in plaintiff's Complaint and are hereby stricken.

(b) J. C. Hilsman, et.al., Parcel M-80—The defendants' motion to require the plaintiff to make a deposit and file a declaration of taking, and to require the plaintiff to furnish a survey of lands being condemned in this action are overruled.

• • • • • • • • • • •

(d) Paul Boswell, et.al., Parcel G-64A—The defenses raised in the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Defenses fail to state a legal defense to the claims set forth in plaintiff's Complaint and are hereby stricken.

(e) Paul Boswell, et.al., Parcel G-64—The defenses raised in the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Defenses fail to state a legal defense to the claims set forth in plaintiff's Complaint and are hereby stricken.

• • • • • • • • • • •

So Ordered, this 1st day of July, 1976.

/s/ W. A. Bootle
Senior District Judge

[Title Omitted in Printing]

• • • • • • • • • • •

July 1, 1976

Order and Certificate for Immediate Review Under 28 U.S.C. § 1292(b)

This case is one of a series of complaints filed by the Georgia Power Company to condemn property for its Lake Wallace Project under 16 U.S.C. § 814. At the present time this case involves 13 separate parcels or groups of parcels owned by different individuals.

By order of this Court dated March 31, 1976, instructions were given to a Commission appointed pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure instructing said Commission with regard to the procedure it is to follow in the determination of just compensation to be paid for the property being condemned in this case. These instructions, with regard to the determination of just compensation, are based upon rules of law developed in Federal condemnation cases applying Federal substantive law which differs materially from substantive law of the State of Georgia on the question of just compensation.

All of the remaining defendants have asserted by way of defense or motion that the Court's prior order charging Federal rules of valuation is in error and have requested the Court to charge the Commissioners according to the substantive laws of the State of Georgia on the question of just compensation and other substantive issues. The Court has adhered to its previous rulings on these issues in the pre-trial order in this case filed this date.

This Court has based its previous rulings on the applicability of Federal substantive law on the line of cases beginning with *U.S.* v. *Miller*, 317 U.S. 369 (1943). All of the remaining defendants have argued vigorously that state sub-

stantive law applies, and this Court is aware of the decision in *State of Louisiana* v. *Lindsey*, 524 F.2d 934 (5th Cir. 1975), containing a footnote in which the United States Court of Appeals for the Fifth Circuit recognizes, but does not decide, this question. Defendants have further pointed out *Grand River Dam Authority* v. *Grand Hydro*, 335 U.S. 369 (1948), wherein the United States Supreme Court has recognized but not decided the same question.

The central question raised by the defendants and by the cases cited above is:

> Where a private corporation which is a licensee of the Federal Power Commission exercises the power of eminent domain in federal cases pursuant to 16 U.S.C. § 814, should the substantive law, which controls the issue of just compensation and other substantive issues, be drawn from the law of the state where the property is located or from federal law?

It Is, Therefore, Ordered, that this Court's Order entered on July 1, 1976, is amended for the purpose of complying with 28 U.S.C. § 1292(b) by the instant Order.

It Is Further Ordered, that this Court is of the opinion that the above-stated question is a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from this Court's ruling on the aforementioned issue and all other substantive matters may materially advance the ultimate termination of this litigation by resolving the law upon which property valuation is to be based prior to trial to these condemnation acitons before the Commissioners.

It Is Further Ordered, that the Court is of the opinion that the interests of justice and judicial expedience would be best served if the above-referenced action were to be consolidated with the case now pending in the United States Court of Appeals for the Fifth Circuit, a case which poses the same substantial question of law presented in the instant action, said case being *Georgia Power Company* v. *54.20 Acres of Land, et al.*, No. 75-4448 (5th Cir., filed December, 1975). Apellee's Brief having been filed therein on February 13, 1976; and this Court expresses the desire that the appeal from the above orders pursuant to 28 U.S.C. § 1292 (b) be consolidated with that action; in light of the fact that the Plaintiff's license requires it to acquire all property necessary for its project by January 1, 1977, the Court expresses the hope that both of these appeals can be handled on an expedited basis, as outlined in the Internal Operating Procedure Manual of the United States Court of Appeals for the Fifth Circuit.

It Is Further Ordered that all proceedings in this case are hereby stayed for a period of ten (10) days from the date of this Order, in order that the Defendants may file a Petition for Permission to Appeal under 28 U.S.C. § 1292 (b) and Rule 5 of the Federal Rules of Appellate Procedure. In the event an appeal is granted from this Order, said proceeding shall be further stayed until a final order on this issue from the appellate courts becomes the order of this Court.

So Ordered at Macon, Georgia, this 1st day of July, 1976.

/s/ W. A. Bootle
W. A. Bootle
Senior United States District Judge

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1866

PAUL BOSWELL, LUNCEFORD G. BOSWELL, A. JAMES ELLIOTT, RONALD L. REID, MRS. LYNN P. COCHRAN, B. HARVEY HILL, JR., ROBERT W. HURST, ROBERT L. STEED, CARL H. COFER, ROBERT S. BEAUCHAMP, PEYTON C. HAWES, JR., MARK J. LEVICK, CHARLES L. SCHREEDER, THE SURRO CORPORATION, JIM DODSON, PATRICIA W. WOMACK and MILDRED WARD HILLSMAN, as Executrix under the Will of J. C. HILLSMAN, *Petitioners*

v.

GEORGIA POWER COMPANY, *Respondent*

RESPONSE OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WALLACE MILLER, JR.
W. WARREN PLOWDEN, JR.
Attorneys for Respondent

Of Counsel:

JONES, CORK, MILLER & BENTON
500 First National Bank Building
Macon, Georgia 32101

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

QUESTION PRESENTED 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING WRIT

1. Fifth Amendment United States Constitution Applies 9
2. Court Did Not "Reserve" Opinion In Grand River Dam Case 11
3. No Conflict In Court of Appeals Decision With Decisions of Fourth, Eighth and Ninth Circuits . 12
4. No Conflict In Court of Appeals Decisions With Parnell Nor Its Progeny 17
5. If Georgia Compensation Law Applies Here, All Georgia Condemnation Law Must Apply, Thwarting Federal Power Commission and Federal Court Prerogatives 20
6. Court Decisions Which Require Application of Federal Law Here Irrespective of and Disregarding "Balancing Test" 23

CONCLUSION 28

TABLE OF CITATIONS

CASES:

B. & W. Hen Farms, Inc. v. Georgia Power Co., 222 Ga. 830; 152 S.E.2d 841 (1966) 22
Bank of America v. Parnell, 352 U.S. 29 (1956) 5, 17
Central Nebraska Public Power & Irrigation Dist. v. Harrison, 127 F.2d 588 (8th Cir. 1942) 14
City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) 15
Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960) 18
Feltz v. Central Nebraska Public Power & Irrigation Dist., 124 F.2d 578 (8th Cir. 1942) 14

Page

F. D. Rich Co. v. United States For the Use of Industrial Lumber Co., 417 U.S. 116 (1974) 26
First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946) 19, 23
Grand River Dam Authority v. Grand-Hydro, 335 U.S. 359 (1948) 11
Huber Baking Co. v. Stroehmann Brothers Co., 252 F.2d 945 (2nd Cir. 1958) 24
Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) . 24
Kohl v. United States, 91 U.S. 367 (1876) 16
Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538 (2nd Cir. 1956) 24
Miree v. DeKalb County, 433 U.S. 25 (1977) 5, 8
Oakland Club v. South Carolina Public Service Authority, 110 F.2d 84 (4th Cir. 1940) 15
Piedmont Cotton Mills v. Georgia Ry. & Electric Co., 131 Ga. 129; 62 S.E. 52 (1908) 22
Public Utility District No. 1 v. City of Seattle, 382 F.2d 666 (9th Cir. 1967) 16, 27
Richmond Elks Hall Ass'n. v. Richmond Redevelopment Agency, 561 F.2d 1327 (9th Cir. 1977) 25
Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964) 24
Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942) 9, 23
Washington Dept. of Game v. Federal Power Commission, 207 F.2d 391 (9th Cir. 1953) 15
United States v. Yazell, 382 U.S. 341 (1966) 5, 8
Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966) 5, 7
White v. Georgia Power Co., 237 Ga. 341; 227 S.E.2d 385 (1976) 10

STATUTES:

16 U.S.C. § 814 (1970) 2, 9
Rule 71 A, Federal Rules of Civil Procedure 6, 15
State of Georgia Constitution, Art. I, Sec. III, Par. I (1976) 10
Georgia Laws 1894, p. 39, as amended Georgia Laws 1914, p. 61; Title 36 § 606, 1933 Code of Georgia Annotated 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1866

PAUL BOSWELL, LUNCEFORD G. BOSWELL, A. JAMES ELLIOTT, RONALD L. REID, MRS. LYNN P. COCHRAN, B. HARVEY HILL, JR., ROBERT W. HURST, ROBERT L. STEED, CARL H. COFER, ROBERT S. BEAUCHAMP PEYTON C. HAWES, JR., MARK J. LEVICK, CHARLES L. SCHREEDER, THE SURRO CORPORATION, JIM DODSON, PATRICIA W. WOMACK and MILDRED WARD HILLSMAN, as Executrix under the Will of J. C. HILLSMAN, *Petitioners*

v.

GEORGIA POWER COMPANY, *Respondent*

RESPONSE OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTION PRESENTED

Are state statutory laws and court decisions binding on a federal district court when the question for decision is one involving that portion of the Fifth Amendment to the United States Constitution which provides "nor shall private property be taken for public use, without just compensation," in a condemnation case where a licensee of the Federal Power Commission is condemning private property pursuant

to federal statutory authority conferred upon the licensee by § 21 of the Federal Power Act? (16 USC § 814) (1970)

STATEMENT OF THE CASE

First, we believe the following corrections and/or clarifications to petitioner's Statement of the Case are in order and appropriate:

(a) On page 7 of the Petition there is stated:

"... In the majority panel opinion, Judge Wisdom started from the premise that, despite the Rules of Decision Act, 28 USC § 1652 (1970), federal courts should always apply federal rules of valuation in condemnation actions 'unless there are circumstances unique to a Federal condemnation under § 21 which require the opposite result.' Appendix, p. 15 a."

Judge Wisdom actually stated:

"Courts apply independent rules, however when considering the specific issue of compensation in federal condemnations. E.g., *United States* v. *Miller,* 1943, 317 U. S. 369, 380, 63 S. Ct. 276, 87 L. Ed. 336; *United States* v. *Certain Property Located in Borough of Manhattan,* 2 York, 2 Cir. 1948, 165 F.2d 526, 528 (L. Hand. J.); *United States* v. *Certain Parcels of Land,* 3 Cir. 1944, 144 F.2d 626, 628; *United States* v. *3,595.98 Acres of Land,* 1962 N. D. Cal., 212 F. Supp. 617; 12 Wright & Miller, *Federal Practice and Procedure;* Civil; § 3042 (1973). These cases did not arise in the specific context of a federal condemnation by the Federal Power Act licensee pursuant to Section 21. Nevertheless, we should follow the same rule unless there are circumstances unique to a federal condemnation under Section 21 which requires the opposite result." Appendix 15a.

(b) On page 8 of the Petition there appears the following:

"... Applying the 'balancing test', the majority found the balance to be tipped in favor of the application of a federal common law *essentially* because 'the use of state law could interfere with achievement of congressional aims' by *possibly* increasing the cost of the project to Georgia Power Company. Appendix pp. 23a-26a." (Emphasis added.)

As to this finding "the majority" stated:

"The balance tips toward the need of federal law. ... One possible reason for adopting state law as the federal rule of decision is the advantage of knowing what the state law says compared with the uncertainty as to the rules the federal courts would create. ... Since federal law on compensation already exists, there is no such reason to adopt state law here.

"Most importantly, federal common law of compensation is the appropriate choice in this case because the use of state law could interfere with achievement of congressional aims. Even when Congress passed the Federal Power Act in 1920 its primary concern was to stimulate private development of America's hydroelectric power resources. ... That goal has become even more significant with the energy shortages of the 1970s and the adoption of a national policy to reduce dependence on foreign sources of energy. To fulfill that congressional policy, hydroelectric development must be maximized. The use of state rules of compensation when they would produce a substantially higher award for the land owner could retard development and frustrate the goal of full utilization of hydroelectric resources. ...

"The federal government's option under § 14 of the Act, 16 USC § 807, to acquire a project at

the expiration of a license creates another United States interest in minimizing the cost of licensed facilities by applying federal valuation rules." Appendix 23a, 24a, 25a.

(c) It is stated on page 8 of the Petition that:

"In a sharply worded dissent, Judge Simpson . . . suggests that the majority's concern for speculative and attenuated national interest which tipped the balance here toward the need for a federal law is precisely the same type of misplaced concern which caused the Supreme Court to reverse the Fifth Circuit in *Wallis* and *Miree*. Appendix pp. 41a-43a."

The majority answered Judge Simpson's criticism to their conclusions wherein it is stated by the majority as follows: "Judge Simpson disputes this conclusion. He says our concern that Georgia law may interfere with the development of hydroelectric power has led us down the wrong path traveled by the panel majority in *McKenna* v. *Wallis*. Dissenting opinion, slip opinion at page 961, at page ——. We disagree." Then the majority proceeds at length justifying its position. (Footnote 27, Appendix pp. 26a and 27a.)

(d) Petitioners conclude their Statement of the Case with the following: "Petitioners . . . now seek review, contending that the choice of law principles articulated by the Supreme Court in *Parnell, Wallis, Yazell* and *Miree* demand that state law be applied by federal courts in every case unesss 'a uniform national policy is necessary to further the interest of the federal government.' *Miree* v. *DeKalb County,* supra, at 29."

Parnell, Wallis and *Miree* were in the federal forum because of diversity of citizenship; *Yazell* was

in the federal court because the United States, through the Small Business Administration, was the party plaintiff in the case.

In *Wallis,* (*Floyd Wallis* v. *Pan American Petroleum Corp.,* 384 U.S. 63 (1966), as well as in *Miree* (*Miree* v. *DeKalb County,* 433 U. S. 25) (1977), the questions for determination were the "property" rights of private parties under contracts.

In *Wallis,* the contract involved contended property rights of private parties with respect to a lease made to one of such parties by a government agency pursuant to an Act of Congress which authorizes the agency to make such contract, and in *Miree,* plaintiffs were seeking damages from the defendant for multiple deaths arising out an an airplane crash, on the theory that causation was a breach of a contract between the defendant and the Federal Aviation Administration, and on the basis that the plaintiffs, though not parties to the contract, were the third-party beneficiaries thereof.

In *Parnell,* (*Bank of America* v. *Parnell,* 352 U. S. 29 (1956) the plaintiff sought recovery from the defendants of the principal redemption amount of certain government (Home Owners Loan Corporation) bonds allegedly stolen from plaintiff. The question for determination was the applicability of state or federal law with respect to evidentiary aspects of "burden of proof and good faith."

In *Yazell* (*United States* v. *Ethel Mae Yazell,* 382 U.S. 341 (1966), the United States was suing on a SBA loan made to the Yazells, due to loss to their small mercantile establishment as a result of a flood; the government having foreclosed a mortgage on the

stock of goods, and the action was for the deficiency of $4,000. The question was whether Texas coverture law applied, which gave Mrs. Yazell immunity from liability as to her separate estate. The court applied state law, principally because the loan was executed by SBA with the knowledge of, and in the face of, and on the basis of coverture immunity of Mrs. Yazell.

In *Wallis, Miree* and *Yazell,* three of the four cases relied upon by Petitioners, the question was the determination of the applicable law to rights asserted, or opposed, which grew out of contractual obligations; and *Parnell,* the fourth such case, involved only the question of applicable law as to burden of proof and good faith.

Such four cases, ***neither singly nor jointly,*** so relied upon by Petitioners, derive (1) the subject matter of the litigation, (2) the rights sought to be enforced, (3) the power to enforce such rights, (4) the forum to execise such power and to enforce such rights, and (5) the procedure to be followed in the exercise and enforcement of such rights as an "agent" of the United States, from Acts of Congress, as does Respondent Georgia Power Company, 16 USC § 814 and Rule 71A, Civil Rules of Procedure.

In *Parnell,* a diversity case, the court summarily dealt with the question here involved, wherein the court stated: "The present litigation is purely between private parties and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here, exclusively involving the transfer of government paper between private parties, is that the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular state regarding the liability of a converter. This is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern." At pages 33 and 34, 352 U.S.

In *Wallis,* a diversity case, the court portrays the lack of federal, national concern in the litigation wherein the court states: "The question before us is whether in general, federal or state law should govern the dealings of private parties in an oil and gas lease validly issued under the Mineral Leasing Act of 1920.[5]"

The footnote No. 5 states:

> "How possible federal rules would differ from those used by Louisiana has not been specified precisely. The Court of Appeals intimated that the devices of resulting and constructive trusts, said not to be recognized in Louisiana, might be available under federal law and useful to respondents. It may be thought that federal law would not embody a statute of frauds so oral understandings could be proved. In this instance, we believe the question of applicability of state versus federal law can be decided without further refinement of the issue." 384 U. S. at 66, 67.

In *Yazell,* the $4,000 deficiency lawsuit against Mrs. Yazell, who operated with her husband "a small shop to sell children's clothes," the Court upheld the decision of the circuit court, stating: "We hold that in the circumstances of this case, the state rule gov-

erns . . ." Some of the "circumstances" were the loan "was negotiated with specific reference to Texas law, including the peculiar acknowledgment set forth above" (necessarily executed by Mrs. Yazell to cover her interest in the stock of goods mortgaged); that the Small Business Administration "was aware and is chargeable with knowledge that the contract would be subject to the Texas coverture" (the law immunizing Mrs. Yazell from liability); "that both the SBA and the Yazells entered into the contract without any thought that the defense of coverture would be unavailable to Mrs. Yazell with respect to her separate property as provided by Texas law"; "and that, in the circumstances, the United States is seeking the unconscionable advantage of recourse to assets for which it did not bargain." 382 U.S. at 346.

In *Miree* (*Miree* v. *DeKalb County,* 433 U.S. 25, (1977), a diversity case, the court indicates that in cases where federal jurisdiction is based on diversity of citizenship, the application of federal common law to resolve the issue presented necessitates and requires the establishment of "a uniform national rule, . . . to further the interest of the federal government . . .," p. 27, and indicates that if a federal statute is the source of the right sued upon or the authority being exercised, then the federal law applies. P. 31.

Miree cites the case of *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U. S. 173 (1942), for the proposition that federal common law may govern even in diversity cases. Sola holds that where a federal statute condemns or makes unlawful the performance of a certain act but is silent upon the penalties or damages consequent upon commission of such prohibitive

act, federal law is applicable in determining the penalty or damages, and state law to the contrary must succumb. By analogy, we submit, that if a federal statute gives an authority or right to perform an act but is silent upon the consequences, penalties or damages occasioned by exercise of such right, then necessarily the federal law must apply in determination thereof, contrary state law notwithstanding.

> "When a federal statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal policy and statute, conflicting state law and policy must yield."
>
> *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U. S. 173, (1942)

REASONS FOR DENYING THE WRIT

1. Fifth Amendment United States Constitution Applies

Determination of the Fifth Amendment "just compensation" under federal statutory condemnation requires federal law resolution.

16 USC § 814 (Petition, pp. 4, 5) gives a Federal Power Commission licensee full power to condemn lands for fulfillment of the license purposes in the federal district court wherein the land lies. At the time of passage of such Act, the year 1920, there was no general applicable federal procedure for such cases. The Act provided for utilization of the state *procedures* wherein the property lies. There was then existent federal substantive court established law for

determination of the "just compensation," and thus such Act provided for none.

In this regard, the Circuit Court states:

> ". . . (T)he Federal Power Act contains many explicit acknowledgements of state authority . . . The failure to mention specifically state laws of eminent domain contrasts with these provisions, and suggests, if anything, that Congress did not believe it necessary to follow state eminent domain rules or desire courts to do so." Appendix 9a and 10a

It is inconceivable that Congress intended other than that the Fifth Amendment to the United States Constitution, with respect to the taking of private property for public purposes, would apply in condemnation cases by a licensee of the Federal Power Commission pursuant to 16 USC § 814. The federal Constitution provides for "just compensation."

The Constitution of the State of Georgia provides "private property shall not be taken *or damaged,* for public purposes, without just and adequate compensation being first paid . . ." (Emphasis added.) Article I, Sec. III, Par. I, Constitution of the State of Georgia of 1976. Attorney fees and expenses of litigation are allowed a condemnee-landowner under the Georgia law (Petition, p. 6, Footnote 2), and this allowance is made on the basis of the "damage" provision in the Georgia Constitution. *White* v. *Georgia Power Co.,* 237 Ga. 341, 342; 227 SE2d 385, 386.

> "When it condemns land under § 21, a licensee acts as the agent of the United States government. *Tuscarora Nation of Indians* v. *Power Authority,* 2nd Cir. 1958, 257 F2d 885, 894, vacated as moot sub nom, *McMoran* v. *Tuscarora Nation of Indians,* 362 U. S. 608, 80 S. Ct. 960, 4 L.Ed2d 1009."

Appendix 5a and 6a.

> "We find that the source of the power to condemn property contained in § 21 is federal. Eminent domain inheres in sovereignty See *Kohl* v. *United States,* 1876, 91 USC 367, 23 L.Ed. 449. . . .
>
> ". . . The Supreme Court has held that . . . 'The measure of compensation (is) grounded upon the Constitution of the United States.' *United States* v. *Miller,* 1943, 317 U.S. 369, 380 63 S. Ct. 276, 283, 87 L.Ed. 336 . . . The appellants (petitioners here) attempt to distinguish *Miller* on the ground that the plaintiff was United States rather than a private licensee. We cannot see why in this context the identity of the plaintiff would change the meaning of virtually identical language . . ."

Appendix 5a and 7a.

2. Court Did Not "Reserve" Opinion In Grand River Dam Case

Petitioners' contention that this Court has expressly reserved opinion on the applicable law in such a case as the instant one is not justified. While it is true that in *Grand River Dam Authority* v. *Grand-Hydro,* 335 U. S. 359, this Court, affirmed the Supreme Court of Oklahoma in a state court condemnation proceeding, brought under state law with respect to compensation, and while it is true that this Court stated that it was expressing "no opinion upon what would be the appropriate measure of value in a condemnation action brought by the United States or by one of its licensees in reliance upon rights derived under the Federal Power Act," we respectfully sub-

mit that this Court did not "expressly reserve" an opinion thereon. In that case, Grand River Dam Authority filed its condemnation proceeding under the state law of Oklahoma at a time when it had eminent domain power from the state of Oklahoma, but did not possess a license from the Federal Power Commission, but pending that state court proceeding it did obtain such a license, and without amending its case and proceeding in its capacity as a Federal Power licensee under 18 USC § 814, it continued to proceed with its same state authority and was making the contention that simply because it had acquired a federal license, the state law on values was preempted by the federal law. With this contention, Grand River got no reception.

We believe what the Supreme Court was saying in *Grand River,* by the use of its language cited above, and on page 10 of the Petition, was that the appropriate measure of value in a condemnation brought by the United States, or by one of its licensees under the Federal Power Act, would be the same and that the federal law of value would apply even though the action were brought in the state court; the same as the Circuit Court of Appeals in this case has stated in its decision. Appendix 27a et seq.

3. No Conflict In Court of Appeals Decision With Decisions of Fourth, Eighth and Ninth Circuits

The decision of the Court of Appeals in this case is *not* in conflict with decisions of courts of appeals of the Fourth, Eighth or Ninth Circuits.

On page 10 the Petition states: "The decision of the Court of Appeals here directly conflicts with at least seven decisions of the Court of Appeals of the

Eighth Circuit. The Eighth Circuit decisions, headed by *Feltz* v. *Central Nebraska Public Power and Irrigation District,* 124 F2d 378 (8th Cir. 1942) and listed in Footnote 18 of the majority opinion of the Court of Appeals (Appendix, p. 11a), expressly holds that the substantive laws of the forum state apply in actions under § 21 of the Federal Power Act."

This statement of petitioners is simply not a correct statement.

Continuing with the Petition, it is stated: "The majority opinion of the Fifth Circuit dismisses this line of cases because of 'the absence of any reasoned discussion'. Appendix, pp. 11a-12a."

This quotation from the decision of the Court of Appeals in this case is taken out of context, would appear to be the complete statement of such court with reference to the matters referred to; and this is not correct factually. What the Court of Appeals did say about *Feltz,* among other things, is as follows:

> ". . . Without articulating its reasoning, the court indicated that Nebraska law controlled both issues. There is no indication that the parties contested this issue or that the court gave it any serious consideration. Indeed, because of the mixture of issues each party may have thought it to his advantage to rely upon the state law . . . The specific issue of just compensation raised before this court was not considered. The other Eighth Circuit cases also lack any discussion of a general choice of law problem or of the specific issue before us. In the absence of any reasoned discussion of the difficult choice of law issue, we cannot accept these cases as persuasive authority or interpret congressional inattention to them as an endorsement of the view that the state law should

fill all substantive gaps in Sec. 21." Appendix, p. 21a.

In all of the Eighth Circuit cases *Central Nebraska Public Power and Irrigation District* is the one exercising the power of eminent domain. The first of these cases, *Feltz* v. *Central Nebraska Public Power and Irrigation District,* does not specifically so state, but it is apparent from a reading of that case that the power of eminent domain was being exercised under eminent domain powers granted by the State of Nebraska, that both parties were traveling on the basis that state law applied, and no issue was made or mentioned as to federal law being applicable as opposed to state law.

The next Eighth Circuit case, *Central Nebraska Public Power and Irrigation District* v. *Harrison,* 127 F2d 588, discloses on its face in quotations from the petition to condemn that the proceeding was brought in accordance with the state law of Nebraska, wherein it is stated, at page 589, as follows:

> "The District commenced its condemnation proceeding on March 27, 1940 . . . in which it alleged, among other things, . . . 'that applicant is entitled to the appointment of appraisers to appraise said land for the condemnation of the same *in accordance with the laws of Nebraska,*' in which it prayed that the court appoint appraisers to 'inspect and view said lands and to assess the value of said lands and any damages which the owners . . . may sustain by reason of the appropriation thereof.' " (Emphasis added.)

In all of the other Eighth Circuit cases there is nothing appearing from the reported cases that either

party contended federal law as to determination of compensation applied.

Petitioners claim a conflict in the Court of Appeals decision in this case and the decision in the case of *Oakland Club* v. *South Carolina Public Service Authority,* 110 F2d 84 (4th Cir. 1940), wherein the Fourth Circuit Court upheld a finding by the district court in that case that § 21 of the Federal Power Act is complimentary to the state law, enabling a licensee to exercise in federal courts the substantive rights of eminent domain granted to it under the state law in cases where the federal law made no provision but the state law did.

We have nothing like that here, and in none of these cases involved would the federal district court have any sort of jurisdiction and authority to apply any state law. Rule 71A of the Federal Rules of Civil Procedure was not in being in the year 1940, the vintage of *Oakland Club,* but with the instant cases 16 USC § 814 and Rule 71A, together with the applicable portion of the Fifth Amendment to the United States Constitution and federal decisions thereunder, provide a complete set of rules for practice, procedure and determination of compensation in eminent domain cases. *State of Washington* v. *FPC,* 207 F2d 391 (9th Cir. 1953), *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320, (1958)

In the instant cases, there being no diversity of citizenship and the actions being brought under 16 USC § 814, the ruling of this Court in *Kohl* v. *United States,* 91 U.S. 367, 23 L.Ed 449 (1876), would make it impossible for the district court to have applied state law; *Kohl* stating: " . . . If the United States

have the power, it must be complete in itself. It can neither be enlarged nor diminished by a state. Nor can any state prescribe the manner in which it must be exercised. The consent of a state can never be a condition precedent to its enjoyment. Such a consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired."

The Circuit Court fully and completely answered Petitioners' cntention with respect to the Eighth Circuit Court cases and that of the Fourth Circuit. Appendix, p. 11a et seq.

Next Petitioners contend there is a conflict between the decision of the Court of Appeals in this case and the case of *Public Utility District No. 1* v. *City of Seattle,* 382 F2d 666 (9th Cir. 1967), based on the fact that the Ninth Circuit Court held that the Utility District in that case would have to pay for shorelands and power site values, whereas had the United States itself been acquirer, no compensation need be paid therefor because of its dominant navigational servitude.

We can add nothing to what the Circuit Court of Appeals had to say about this contention, as follows:

> "Whether a licensee enjoys the dominant navigational servitude is irrelevant to the issue before us, The Ninth Circuit did not question that Sec. 21 delegates some of the federal government's powers. And the opinion does not support the contention that a licensee enjoys anything less than the full federal power to condemn private property. Significantly, when the Ninth Circuit turned to the amount of compensation due the shoreland and upland property owners, *it relied exclusively on federal cases.* See 388 F2d 673-74." (Emphasis added.)

Appendix, p. 17a.

4. No Conflict In Court of Appeals Decisions With Parnell Nor Its Progeny

The decision of the Court of Appeals in this case is not in conflict with choice of law principles developed by this Court in *Bank of America* v. *Parnell,* 352 U.S. 29 (1956), nor its progeny.

Petitioners contend that the Court of Appeals in this case, in applying the "balancing test," did not include certain factors which this Court has considered in developing principles with respect thereto.

The Court of Appeals in its decision covers every facet of the "balancing test" principles in its decision, beginning Appendix 14a through 29a, embracing the following principles:

(a) "Because the source of the power delegated by the Federal Power Act is federal, the governing law must be federal." Appendix, p. 14a.

(b) "Courts apply independent rules, however, when considering the specific issue of compensation in federal condemnations." Appendix, p. 15a.

(c) "Unless we find the weights on our scale to be substantially different, we see no reason to diverge from the conclusion of the Supreme Court and some of our courts of appeals." (The court is referring to the balancing test), Appendix, p. 16a, Footnote 21.

(d) As to the intent of Congress with respect to the national interest as pertains to authority given a

licensee, the Court of Appeals in this case cites the following excerpts from *Federal Power Commission* v. *Tuscarora Indian Nation,* 362 U. S. 99, (1960), as follows:

> "But "Sec. 177 (25 USC) is not applicable to the sovereign United States *nor hence to its licensees* to whom Congress has delegated federal domain powers under Sec. 21 of the Federal Power Act." Appendix 18a.

(e) The Court of Appeals reviews very carefully, and in detail, the cases of *Clearfield Trust, Parnell, Wallis, Miree, Yazell* et al., and their specific holdings as applied to the facts therein involved, thus taking into consideration in its decision in this case all principles embodied in such cases. Appendix 20a, 21a.

The Court of Appeals, with respect to these cases, concludes: "Together these cases produce a balancing test. . . . On one side is the federal interest in carrying out a program in the most efficient and effective manner possible. On the other is a state's interest in the preservation of its control over local interests, particularly traditional interest, such as family law and real property transactions, and in preventing displacement of state law. Of course, the ultimate goal of the creation of federal law by courts is to carry out the federal program in question. Thus, if state law would actually frustrate rather than only hinder a federal program, federal common law *must* be applied regardless of state interest. . . . On the other hand, the Supreme Court has demonstrated a growing desire to minimize displacement of state law. . . ." Appendix, p. 21a, 22a.

(f) Then the Court of Appeals "weighs" the factors which each side has submitted for its side of the scales, Appendix, 22a, 23a, and concludes that "the balance tips toward the need for federal law. . . . Since federal law on compensation already exists, there is no (such) reason to adopt state law here." Appendix, p. 23a.

(g) The Circuit Court then states: "Most importantly, federal common law of compensation is the appropriate choice in this case because the use of state law could interfere with achievement of congressional aims"; and then follows its elaboration for justification of its quoted statement, including increased costs of the project to the licensee which would interfere with the national interest in reducing energy costs and the ultimate cost to the federal government if its option under 16 USC § 807 were exercised and the project acquired by the United States. Appendix 24a-27a.

(h) The finding and rulings of this Court in the case of *First Iowa Hydro-electric Co-operative* v. *Federal Power Commission,* 328 U. S. 152, (1946), should satisfactorily answer the requirements of "a significant conflict between some federal policy or interest and the use of state law in the premises," and the interest to be protected should be "uniform in character throughout the nation," with respect to the "balancing test" referred to in the Petition, pp. 12 and 13, to-wit:

> "The closeness of the relationship of the federal government to these projects (hydro-electric projects of licensee of Federal Power Commission) and its obvious concern in maintaining control over their engineering, economic and finan-

cial soundness is emphasized by such provisions as those of § 14 authorizing the federal government, at the expiration of a license to, take over the licensed project by payment of 'the net investment of licensee in the project or projects taken, not to exceed the fair value of the property taken,' plus an allowance for severance damages. . . .

". . . It (Federal Power Act of 1920) was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the nation. . . .

"It was a major undertaking involving a major change of national policy. . . .

"The detailed provisions of the Act providing for the federal plan of regulation leaves no room or need for conflicting state controls.[25]" The footnote 25 provides in part as follows:

". . . § 14 recapture of projects and payment for them by the government upon expiration of the licenses, thus giving the government a direct interest in and need for control of every feature of each licensed project. . . ." pp. 172-173, 180, 181.

5. If Georgia Compensation Law Applies Here, All Georgia Condemnation Law Must Apply, Thwarting Federal Power Commission and Federal Court Prerogatives

If Georgia law as to compensation determination is applicable, then all other Georgia eminent domain applies.

If the courts hold that the law of Georgia applies in determining the compensation to landowners in cases such as these, it would appear that all other

Georgia law pertaining to the rights of landowners in eminent domain cases will control, such as:

(a) "Upon the payment by the corporation or person seeking to condemn, the amount of the award, and final judgment on appeal, such corporation or person shall become vested with such interest in the property taken as may be necessary to enable the corporation or person taking to exercise its franchise or conduct its business; and whenever the corporation or person shall cease using the property taken for the purpose of conducting its business, said property shall revert to the person from whom taken, his heirs or assigns; . . ."

Ga. Laws 1894, p. 99, as amended Ga. Laws 1914, p. 61; Title 36, § 606 of 1933 Code of Georgia Annotated.

(b) "Where the route (for a railroad line) selected and sought to be condemned . . . ran near the cotton mill of the owner . . . it was error to exclude testimony offered (by the landowner) for the purpose of showing that such company acted in bad faith in selecting the route it did select, to the effect that the portion of the land over which such route was selected was the only location on such land on which its mill could be scientifically and economically enlarged, and that to enlarge the plant at any other location on said land would necessitate the building of a new and independent mill which could not be operated in connection with the existing plant.

"A party having the right of condemning private property for public purposes can only condemn such amount thereof as is useful, needful and necessary for public purposes. If such party, in condemnation proceedings makes an effort to condemn more land than is necessary for public purposes . . . the owner of such land has

the right to have a court of equity intervene and enjoin the condemnation of such of his lands as is not necessary for public purposes."

Piedmont Mills v. *Georgia Railway & Electric Co.,* 131 Ga. 129; 62 S.E.52. (1908)

(c) ". . . The remedy of the landowner is to apply to a court of equity to enjoin illegal (condemnation) pleadings. . . .

". . . Here the condemnor seeks a judgment which will prevent the condemnee from erecting on the premises involved (easement for transmission line right-of-way) any building or structure other than fences. Such an interest is broad enough to prohibit the condemnee as the owner of the fee from erecting on his land any building or structure which will not interfere in any way with the full and complete use of the easement rights which the condemnor seeks to acquire by its condemnation proceeding, or after the erection thereof to require their removal therefrom by any appropriate legal or equitable proceeding.

". . . Conceivably, the condemnee may in the future desire to place or erect structures or other improvements on such land which will not interfere with the full and complete use and enjoyment of the easement which the condemnor seeks to acquire by this condemnation proceeding and this, we hold, it should have a right to do."

B. & W. Hen Farm, Inc. v. *Georgia Power Co.,* 222 Ga. 830 152 S.E.2d 841 (1966).

The application of such Georgia law would be an allowance of what this Court condemned in *First Iowa Hydro-Electric,* supra, wherein this Court stated:

". . . It (the requiring of licensee of Federal Power Commission to obtain state permit for hydro-electric project) would subordinate to the

control of the state the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government."

228 U. S. 164

6. Court Decisions Which Require Application of Federal Law Here Irrespective of and Diregarding "Balancing Test"

We respectfully submit that the following rather closely related principles of law laid down by this Court require the application of federal law to the ascertainment of just compensation in the case here involved, and similar cases, without any application of the "balancing test."

". . . There (in Erie RR. v. Thompkins, 304 U. S. 64 (1938), we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by *the sweep of federal statutes* that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. (Citing authority). When a federal statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield . . ." (Emphasis added.)

Sola Electric Co. v. *Jefferson Electric Co.,* 317 U.S. 173, 175, (1942)

"... These laws, like other laws of the United States enacted pursuant to constitutional authority, are the supreme law of the land. (Citing authority.) When the state law touches upon the area of these federal statutes, it is 'familiar doctrine' that the federal policy 'may not be set at naught, or its benefits denied' by the state law. (Citing authority.) This is true, of course, even if the state law is enacted in the exercise of otherwise undoubted state power."

Sears Roebuck & Co. v. *Stiffel Co.,* 376 U. S. 225, 229, (1964)

Accord, *Kewanee Oil Co.* v. *Bicron Corp.,* 416 U.S. 470, 479, 480, (1974)

"... Jurisdiction in the court below was based on diversity of citizenship, and, therefore, it would seem that in view of the decision of the United States Supreme Court in *Erie RR* v. *Tompkins* and *Klexton Co.* v. *Stempor Mfg. Co.,* one should turn to the whole law of New York, as a New York court would do, to decide the controlling rules of the decision for the case at bar. But it has also been suggested, and indeed on sound reason, that it is the *source of the right* sued on rather than the basis of federal jurisdiction which determines the law governing a particular case." (Emphasis added.)

Huber Baking Co. v. *Stroehmann Bros. Co.,* 252 F2d 945, 951 (2d Cir 1958) citing *Maternally Yours* v. *Maternity Shop, Inc.,* 234 F2d 538, 539 540 (2nd Cir.) (1956)

On page 15 of the petition, petitioner states, "It is also important to realize that this case marks the first time since *Erie R.R.* v. *Thompkins,* 304 U.S. 64 (1938), that a Federal common law has been applied

in litigation involving purely private parties and to which the United States is not a party."

Evidently, petitioners are not familiar with the case of *Richmond Elks Hall Assn.* v. *Richmond Redevelopment Agency,* 561 F.2d 1327 (Sept. 30, 1977) 9th Cir.

We were not aware of this case until just recently and feel confident that the Circuit Court of Appeals for the Fifth Circuit was not.

It was cited by none of the parties nor the Court.

That case is an *"inverse" condemnation* case brought by Elks Hall against Richmond Development, both private parties, with jurisdiction being invoked on the basis that private property was taken for public purposes without compensation in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States. The property owner, Richmond Elks, among other things, *was contending for recovery of "litigation expenses, including attorneys' fees and expert witness fees".* Page 1328.

Richmond Elks was contending for its litigation expenses based on provisions of statutes pertaining to Department of Housing and Urban Development (HUD), contending for the same "under the Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation", and finally *on state law* "which specifically awards costs and expenses to owners that obtain judgments in inverse condemnation actions against public entities." Pages 1332, 1333. All of these bases for collection of litigation expenses were rejected, and

with respect to the state law basis of the claim the 9th Cir. stated:

> " . . . In rejecting this contention, the District Court relied on the Supreme Court's decision in *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116. 94 S. Ct. 2157, 40 L.Ed. 2nd 703 (1974), which reversed a decision of this circuit awarding attorney's fees in a suit brought under the provisions of the Miller Act. In *F. D. Rich Co.*, the Supreme Court observed:
>
> > '(t)he Miller Act provides a Federal cause of action, and the scope of the remedy as well as the substance of the rights created thereby is a matter of Federal not state law. Neither respondent nor the Court below offers any evidence of Congressional intent to incorporate state law to govern such an important element of Miller Act litigation as liability for attorneys' fees.'
>
> *Id.* at 127, 94 S.Ct. at 2164.

"We agree with the District Court . . ." 561 F2d 1333-4.

Next we turn to the *F. D. Rich Co.* case in this Court. This was a case that applied Federal law in a controversy between private parties; the office of the United States in this Court was nominal and its appearance therein was only to fulfill the technical necessity to sue for the use of the real party at interest, Industrial Lumber Company, Inc.

This Court stated:

> " . . . The Miller Act provides for a Federal cause of action, and the scope of the remedy as well as the substance of the rights created thereby is a matter of Federal not state law. Neither respondent nor the Court below offers any evidence of Congressional intend to incorporate state law to govern such an important element of Miller Act litigation as liability for attorneys' fees . . ." *F. D. Rich Co., Inc. f. U. S. for the use of Industrial Lumber Co., Inc.*, 417 U.S. 116, 127 (1974).

Likewise, as to Petitioners' comment on page 15 of the Petition that "This case marks the first time since Erie RR v. Thompkins, 305 U. S. 64 (1938) that a federal common law has been applied in litigation involving purely private parties and to which the United States is not a party," another such case applying the federal common law is *Public Utility District No. 1* v. *City of Seattle* (9th Cir. 1967), 382 Fed. 666; (1969) Cert. dismissed, 396 U.S. 803 and with respect to which the Court of Appeals in this case stated:

> "Whether a licensee enjoys the dominant navigational servitude is irrelevant to the issue before us. The Ninth Circuit did not question that § 21 delegates some of the federal government's powers. And the question does not support the contention that a licensee enjoys anything less than the full federal power to condemn property. *Significantly, when the Ninth Circuit turned to the amount of compensation due the shoreland and upland property owners it relief exclusively on federal cases.* See 382 F.2d at 673-74." (Emphasis added.) (Appendix 17a.)

Thus it is that the petition fails to demonstrate any justification for the grant of the writ sought under Rule 19 of this Court, or otherwise.

CONCLUSION

For all of the foregoing, it is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in this case should be denied.

Respectfully submitted,

WALLACE MILLER, JR.
W. WARREN PLOWDEN, JR.
Attorneys for Respondent

Of Counsel:

JONES, CORK, MILLER & BENTON
500 First National Bank Building
Macon, Georgia 32101
Telephone No. 912/745-2821

No. 77-1866

In the Supreme Court of the United States

OCTOBER TERM, 1978

PAUL BOSWELL, ET AL., PETITIONERS

v.

GEORGIA POWER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

WILLIAM ALSUP
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530

ROBERT R. NORDHAUS
General Counsel

HOWARD E. SHAPIRO
Solicitor
Federal Energy Regulatory Commission
Washington, D.C. 20426

INDEX

	Page
Question presented	2
Statutes involved	2
Statement	4
Argument	6
Conclusion	18
Appendix A	1a
Appendix B	2a

CITATIONS

Cases:

Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240	5
Aquilino v. *United States*, 363 U.S. 509	14
Bauman v. *Ross*, 167 U.S. 548	5, 8
Bishop v. *Wood*, 426 U.S. 341	14
Board of Regents v. *Roth*, 408 U.S. 564	14
Central Nebraska Public Power and Irrigation District v. *Harrison*, 127 F.2d 588	17
Cherokee Nation v. *Kansas Ry. Co.*, 135 U.S. 641	14
Clearfield Trust Co. v. *United States*, 318 U.S. 363	16
DeKalb County v. *Trustees, Decatur Lodge No. 1602, B.P.O. Elks, et al.*, No. 33628 (November 22, 1978)	5
De Sylva v. *Ballentine*, 351 U.S. 570	14
FPC v. *Oregon*, 349 U.S. 435	15
Florida Gas Transmission Co. v. *DuPont*, 264 So.2d 708	13

Cases—Continued

	Page
Gulf Interstate Gas Co. v. *J. C. Garvin*, 303 S.W.2d 260	13
Lohmann v. *Natural Gas Pipeline Co. of America*, 434 S.W.2d 879	13
Michigan Wisconsin Pipeline Co. v. *Fruge*, 227 So.2d 609	13
Oakland Club v. *South Carolina Public Service Authority*, 30 F. Supp. 334 aff'd, 110 F.2d 84	17
Regional Rail Reorganization Act Cases, 419 U.S. 102	5, 7
Swift v. *Tyson*, 41 U.S. (16 Pet.) 1	16
United States v. *Milier*, 317 U.S. 369	7, 14, 15, 17
United States v. *93.970 Acres*, 360 U.S. 328	15
United States v. *Reynolds*, 397 U.S. 14	14
United States ex rel. T.V.A. v. *Powelson*, 319 U.S. 226	14

Constitution, statutes, regulation and rule:

	Page
United States Constitution, Fifth Amendment	14, 15, 16
Act of July 2, 1864, ch. 216, Section 3, 13 Stat. 357	7
Department of Energy Organization Act, Pub. L. No. 95-91, Section 402(a)(1)(A) and (D) (41 U.S.C. 7172)	1
Federal Power Act, ch. 285, Section 1, 41 Stat. 1063, 16 U.S.C. 792 *et seq.*	2
Section 4(b), 16 U.S.C. 797(b)	12
Section 4(f), 16 U.S.C. 797(f)	10
Section 4(e), 16 U.S.C. 797(e)	4
Section 5, 16 U.S.C. 798	10

Constitution, statutes, regulation and rule—Continued

	Page
Section 14, 16 U.S.C. 807	12
Section 21, 16 U.S.C. 814	2, 4, 5, 6, 7, 15, 17
Natural Gas Act, ch. 333, 61 Stat. 459:	
Section 7, 15 U.S.C. 717f	2, 6, 7
Section 7(h), 15 U.S.C. 717f(h)	3, 6, 7, 13
Public Utility Regulatory Policies Act (PUPPA), Title IV, Pub. L. No. 95-617, 92 Stat. 3154 *et seq.*:	
Section 405	10, 11
Section 406	11
Section 408(1)	11
Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601	14
39 U.S.C. 5401	7
40 U.S.C. 490	7
45 U.S.C. 562(d)(1)	7
45 U.S.C. 743	7
Ga. Code Ann. § 36-504 (1970)	4
18 C.F.R. 2.7 (1977)	10
Rule 71A, Fed. R. Civ. P.	4, 7, 15

Miscellaneous:

	Page
FPC Order No. 313, 34 F.P.C. 1546 (1965)	9
1977 Final Annual Report of the Federal Power Commission (1978)	9
3 Nichols, *The Law of Eminent Domain* (1976)	8

Miscellaneous—Continued Page

P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and The Federal System* 770 (2d ed. 1973) 16

S. Rep. No. 429, 80th Cong., 1st Sess. (1947) 13

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1866

PAUL BOSWELL, ET AL., PETITIONERS

v.

GEORGIA POWER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation of October 2, 1978. The views expressed are those of the United States and the Federal Energy Regulatory Commission.[1]

[1] Under Section 402(a)(1)(A) and (D) of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 583, to be codified as 42 U.S.C. 7172(a)(1)(A) and (D), this Commission has succeeded to the functions and responsibilities of the former Federal Power Commission with respect to licensing of hydroelectric facilities on navigable waters under Part I

QUESTION PRESENTED

Whether federal law, rather than the law of the forum state, governs the measure of compensation in condemnation proceedings brought in a federal district court by a federal hydroelectric licensee under the right of eminent domain conferred by Section 21 of the Federal Power Act.

STATUTES INVOLVED

Section 21 of the Federal Power Act, ch. 285, 41 Stat. 1074, 16 U.S.C. 814, provides:

> That when any licensee can not acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceedings for that purpose in the district

---

of the Federal Power Act, 16 U.S.C. 792 *et seq.*, and certification of natural gas transmission facilities under Section 7 of the Natural Gas Act, 15 U.S.C. 717f.

> court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, that the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

Section 7(h) of the Natural Gas Act, ch. 333, 61 Stat. 459, 15 U.S.C. 717f(h), provides:

> (h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

STATEMENT

Respondent Georgia Power Company obtained a license from the Federal Power Commission under 16 U.S.C. 797(e) to construct a dam and hydroelectric generating facility on the Oconee River in Georgia. Respondent then initiated eminent domain proceedings in the United States District Court for the Middle District of Georgia under Section 21 of the Federal Power Act, 16 U.S.C. 814, to condemn certain property for the project. The district court instructed the commissioners appointed under Rule 71A of the Federal Rules of Civil Procedure to apply substantive standards of federal rather than Georgia law in determining the amount of compensation to be awarded (Pet. App. 1a-3a).

On consolidated appeals by the landowners, a divided court of appeals affirmed. The court found that Georgia law may allow higher condemnation awards than federal law in three respects (Pet. App. 3a): (1) Georgia may recognize increases in the value of the condemned property that are created by the project for which the property is being taken. (2) A Georgia statute (Ga. Code Ann. § 36-504 (1970)) prohibits setting-off against the value of the property taken the value of benefits conferred by the project on remaining property of the landowner. (3) At the time of the court's decision, Georgia law provided for the award of reasonable attorneys' fees to the condemnee.[2]

[2] Subsequently, on November 22, 1978, the Supreme Court of Georgia overruled prior case law and held that attorneys' fees need not be included in the measure of just compensation under the Georgia Constitution. *DeKalb County* v. *Trustees, Decatur Lodge No. 1602, B.P.O. Elks, et al.*, No. 33628. We are reproducing this opinion as Appendix B, *infra*.

In contrast, federal law does not recognize increases in the value of property taken by eminent domain that are created by the project for which the property is taken. *United States* v. *Reynolds*, 397 U.S. 14, 16-18 (1970); *United States* v. *Miller*, 317 U.S. 369 (1943); *Bauman* v. *Ross*, 167 U.S. 548, 584 (1897). It is also established under federal law that any special benefits to a property owner's remaining properties may be counted in the determination of just compensation for the property taken. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 151 (1974); *Bauman* v. *Ross*, *supra*, 167 U.S. at 584. Finally, federal law permits recovery of attorneys' fees only as specifically provided by statute, *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975);[3] and no statute authorizes the award of such fees against condemnors in actions under Section 21 of the Federal Power Act.

In affirming the district court's choice of federal law, the majority of the court of appeals found the Federal Power Act and its legislative history inconclusive on the standards to be applied in determining the amount of compensation (Pet. App. 5a-11a). The majority held, however, that the measure of com-

[3] But see *United States* v. *1380.09 Acres of Land*, 574 F.2d 238 (5th Cir. 1978), petition for certiorari pending *sub nom. United States* v. *Bodcaw Co.*, No. 78-551.

pensation in Section 21 proceedings should be no different from that used in eminent domain proceedings brought directly by the federal government (Pet. App. 15a, 19a). The majority weighed the competing considerations between federal and state law and concluded that in this context the balance tips toward federal law (Pet. App. 23a). The court thus held that the "federal law defining the minimum compensation requirements of the fifth amendment becomes the law of compensation for a § 21 case" (*id.* at 24a n.25). Judge Simpson dissented, arguing that the federal interests are too remote and speculative to justify application of federal compensation standards to eminent domain proceedings conducted by a private federal licensee (Pet. App. 31a-46a).

ARGUMENT

1. We first discuss the impact of the decision below on the development of federally licensed water-power projects. Section 21 of the Federal Power Act authorizes licensees, when they cannot acquire by purchase, property or other rights necessary to the construction, maintenance, or operation of the licensed works, to acquire such property or rights by eminent domain, either in the United States district court for the district where the property is located or in the state courts. A parallel provision appears in Section 7(h) of the Natural Gas Act, 15 U.S.C. 717f(h), authorizing holders of certificates of public convenience and necessity for natural gas pipelines to exercise

the right of eminent domain to acquire necessary rights of way and land or other property for the construction, operation, and maintenance of such pipelines and related facilities. Congress has conferred the right of eminent domain on many government agencies [4] and on some federally-chartered corporations.[5] Both Section 21 and Section 7(h) provide that when the authorized condemnation actions are brought in federal courts, "[t]he practice and procedure * * * shall conform as nearly as may be with the practice and procedure in similar action[s] or proceeding[s] in the courts of the State where the property is situated." In *United States* v. *Miller*, 317 U.S. 369, 380 (1943), this Court held that such language does not affect the substantive measure of compensation. The procedural requirements have in any event been superseded by Rule 71A of the Federal Rules of Civil Procedure, governing practice and procedure in condemnation cases.

a. The substantial law of just compensation varies considerably among the states. Georgia's rule recognizing increases in value created by the project itself appears to be a localized deviation from the general rule that only loss to the owner, not benefit to the

---

[4] See, *e.g.*, 40 U.S.C. 490 (Administrator of General Services); 39 U.S.C. 5401 (Postal Service).

[5] See, *e.g.*, Section 3, Act of July 2, 1864, ch. 216, 13 Stat. 357 (Union Pacific Railroad); 45 U.S.C. 562(d)(1) (Rail Passenger Service Corporation); 45 U.S.C. 743 (Consolidated Rail Corporation). See also *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

taker, is compensable, and that therefore no increment is allowed for increases in value due to the project unless the property's particular suitability for such uses would in any event affect its ordinary market value. 3 Nichols, *The Law of Eminent Domain* § 8.61 (1976). Rules concerning the setting-off of "special benefits" [6] conferred on the owner's remaining land against the value of the land taken vary among jurisdictions. Georgia's statute prohibiting such a set-off reflects what is said to be the law of 36 states, 13 of which achieve the result by constitutional provision and 23 by statute or judicial construction. 3 Nichols, *supra*, at §§ 8.6206, 8.6211[2]-8.6211[51]. Rules concerning recovery of attorneys' fees generally depend on specific statutes, which again vary among jurisdictions. 3 Nichols, *supra*, at § 8.64.

Although we have not investigated further, it seems reasonable to assume that other differences exist between the rules measuring compensation in various states and the federal standard.

b. The court of appeals assumed that applying state rather than federal law in condemnation proceedings under Section 21 of the Federal Power Act would result in substantially higher compensation costs, and this assumption is supported by the available indications.

---

[6] "[S]pecial benefits" are those that arise from the peculiar relation of the land in question to the public improvement. 3 Nichols, *supra*, at § 8.6203. They contrast with the general benefits to the community at large from completion of the project. *Ibid.* See *Bauman* v. *Ross*, 167 U.S. 548 (1897).

The nation's potential for new development of hydroelectric resources under license from the Commission is substantial. Of the estimated total national resource of 168 million kilowatts of conventional hydroelectric generating capacity, both developed and undeveloped, as of January 1, 1977,[7] only 58.6 million kilowatts had been developed. Thus, undeveloped potential amounted to approximately 110 million kilowatts. Of the developed capacity, a little more than half was owned privately or by non-federal public entities, and approximately 90 percent of that non-federal portion was developed under license from the Federal Power Commission. (As of September 30, 1977, there were 404 major and 95 minor (2,000 horsepower or less) licenses in effect.) Thus, not only is there a large potential for further development, but, if past development is any guide, one may assume that a substantial portion of the further development would take place on non-federal sites under license from the Commission. Development of these sites would require acquisition of land for construction of dams and reservoirs and related generating and transmission facilities, as well as for recreational facilities and for the mitigation of adverse environmental effects.[8]

---

[7] These data and those that follow are drawn from the *1977 Final Annual Report of the Federal Power Commission* 26-29, 50-59 (1978).

[8] FPC Order No. 313, 34 F.P.C. 1546, 1549 (1965), declared as a general policy that the Commission expects its licensees "to acquire in fee and include within the project boundary enough land to assure optimum development of the recrea-

During the 1977 fiscal year, the FPC received applications for major licenses, amendments, and permits involving approximately 7.07 million kilowatts of new capacity. As of September 30, 1977, the Commission also had pending 25 applications for preliminary permits.[9] Many pending applications may not result in the development of projects; many that do may not involve significant land acquisition problems. But each pending application has the potential for significant land acquisition costs. Moreover, even completed projects may be affected by the Commission's policy concerning recreational developments at licensed projects (see note 8, *supra*), which in some circumstances might require licensees to acquire additional land around the margin of existing reservoirs.[10]

---

tional resources afforded by the project. To the extent consistent with the other objectives of the license, such lands to be acquired in fee for recreational purposes shall include the lands adjacent to the exterior margin of any project reservoir plus all other project lands specified in any approved recreational use plan for the project." 18 C.F.R. 2.7 (1977).

[9] Preliminary permits are issued "for the purpose of enabling applicants for a license [under Part I of the Federal Power Act] to secure the data and to perform the acts required" to develop the evidence needed to support an application. 16 U.S.C. 797(f). The effect of a preliminary permit is to confer priority of application for a license on the permittee for a period not exceeding three years, while necessary project data are prepared. 16 U.S.C. 798.

[10] In addition, federal policy now seeks to promote the development of small hydroelectric power projects. Title IV of the recently enacted Public Utility Regulatory Policies Act (PURPA), Pub. L. No. 95-617, approved November 9, 1978, 92 Stat. 3154, establishes a federal program for the financing

As shown in the table attached as Appendix A to this brief, land acquisition costs have averaged about 10 percent of total project costs, or about $1.7 million per project, for all non-federal projects put into operation from 1920 to 1976. For projects put into operation from 1968 to 1976, the land acquisition costs averaged 9 percent of the project costs, but the average amount of land acquisition costs per project rose to $5.5 million. For projects put into operation from 1970 to 1976, the percentage fell to an average of 7.4 percent of project costs, while the average amount of land acquisition costs per project was $4.3 million.

The foregoing costs have already been incurred and will not be affected by the resolution of the issue presented in this case. They suggest, however, the substantial sums involved in land acquisition costs for Commission-licensed projects now under planning or construction, as well as for projects that may be licensed by the Commission in the future. A project's

---

and expeditious authorization of such projects. Section 405 of PURPA provides for simplified licensing procedures by the Federal Energy Regulatory Commission under the Federal Power Act. The new program is limited to the development of projects that will not require new dams or additional impoundment of water (Section 406); it contemplates projects that will generate power from existing dams not presently used for that purpose. Also, the projects must be limited to facilities have not more than 15,000 kilowatts of installed capacity (Section 408(1)). Nevertheless, even such small facilities may require additional land acquisition for water conduits, powerhouses, substations, transmission lines, access roads, recreational facilities, and environmental-impact mitigation.

total costs, including its land acquisition costs, bear directly on its economic feasibility and hence on whether the project will be undertaken. And once a project is undertaken and completed, costs that were incurred for land acquisition are passed on to consumers in the price of the electric power generated. Investment in land acquisition is included in rate-base determinations by the Commission when it regulates interstate wholesale rates for electric power, and by state utility commissions when they set rates for the intrastate sale of power. For these reasons, in the light of the significant differences in land acquisition costs that may result from the choice between federal and state rules for measuring compensation, the choice of the legal standard is a matter of concern to the Commission in carrying out its licensing functions.[11]

The federal government's option under Section 14 of the Federal Power Act (16 U.S.C. 807) to acquire a project at the expiration of its license, to which the court of appeals referred (Pet. App. 25a-26a), is a less important federal interest. Up to September 30, 1977, executive agencies had recommended federal take-over of projects for which the 50-year license had expired in only two cases, each of which involved a

[11] However, the Commission has not, either in its rules and decisions determining what costs for hydroelectric projects are allowable under 16 U.S.C. 797(b) or in its rules and decisions governing rate-making by interstate wholesalers of electricity and natural gas, developed a standard favoring the use of either federal or state criteria in the valuation for land acquisition purposes.

special federal interest.[12] While the future will see an increase in the number of hydroelectric licenses reaching the end of their 50-year term, it cannot be predicted with confidence that many of these projects will be recommended for federal take-over.

With respect to property acquisition costs for natural gas pipelines under Section 7(h) of the Natural Gas Act, much of the property taken in that context consists only of easements for sub-surface rights of way, with the fee interest in the surface retained by the landowner (subject to certain restrictions against inconsistent uses). Moreover, in contrast to reservoirs created by hydroelectric projects, which often confer waterfront or scenic benefits on affected property, natural gas pipelines appear to create no offsetting advantages to properties they traverse. Thus, for pipelines, the present issue appears to have less significance, though the costs of acquisition would still be affected by state rules allowing attorneys' fees, for example.[13]

[12] Both were in part on Indian lands.

[13] Section 7(h) was added to the Natural Gas Act in 1947, 61 Stat. 459, because many states did not confer eminent domain powers on interstate pipeline companies. S. Rep. No. 429, 80th Cong., 1st Sess. (1947). Cases under Section 7(h) of the Natural Gas Act have all arisen in the state courts and appear to have involved damages to adjoining parcels, not valuation. *Gulf Interstate Gas Co.* v. *J. C. Garvin*, 303 S.W. 2d 260 (Ky. 1957); *Florida Gas Transmission Co.* v. *DuPont*, 264 So. 2d 708 (1972 La. App.); *Michigan Wisconsin Pipeline Co.* v. *Fruge*, 227 So. 2d 606 (1969 La. App.); *Lohmann* v. *Natural Gas Pipeline Co. of America*, 434 S.W. 2d 879 (Tex. Civ. App. 1968).

2. Quite apart from its empirical effects on federally-licensed projects, the decision below is correct.

a. Congress has several alternatives in authorizing the use of eminent domain. Congress has the power to authorize public agencies or private corporations to acquire property by the federal power of eminent domain and to pay only the amounts required by the Fifth Amendment. See, *e.g.*, *Cherokee Nation* v. *Kansas Ry. Co.*, 135 U.S. 641, 656-657 (1890). Congress may also authorize the acquisition of property by eminent domain upon payment of more than the amount constitutionally required. See, *e.g.*, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.* Congress might even specify that compensation be measured according to state law. *Cf. De Sylva* v. *Ballentine*, 351 U.S. 570, 580-582 (1956).[14]

The measure of compensation under each eminent domain statute depends on congressional intent. Although the legislative history of Section 21 of the Federal Power Act is silent on the point (see Pet. App. 9a-11a), it is reasonable to conclude that Con-

[14] Although the meaning of "property" in the Fifth Amendment normally obtains its content by reference to state law, *United States Ex Rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 279 (1943); *Board of Regents* v. *Roth*, 408 U.S. 564, 577, 604 (1972) (majority and concurrence); *Bishop* v. *Wood*, 426 U.S. 341, 344 n.7, 349 n.14 (1976); cf. *Aquilino* v. *United States*, 363 U.S. 509 (1960), the measure of "just compensation" and the admissibility of evidence concerning just compensation are controlled by federal law under the Fifth Amendment in federal condemnations. *United States* v. *Miller*, 317 U.S. 369, 376-380 (1943); *United States* v. *Reynolds*, 397 U.S. 14, 16-18 (1970).

gress intended in Section 21 to delegate to federal licensees the same power of eminent domain generally available to the federal government, that is, a power subject only to the Fifth Amendment. The eminent domain power delegated and used here was, after all, a *federal* power—a preexisting power whose constitutional limitations were familiar to Congress. If Congress had intended to restrict the exercise of the power more stringently than the Constitution does, or to permit states to do so, it would have been natural to say so. Cf. *FPC* v. *Oregon*, 349 U.S. 435, 445 (1955). But nothing in the legislative history or the language of the statute suggests that Congress intended any measure of compensation other than that generally available to the federal government.

At first glance, the requirement in Section 21 that the practice and procedure of state courts be followed in federal courts suggests such a deviation. But, as this Court observed in *United States* v. *Miller*, 317 U.S. 369, 380 (1943), language of this kind does not affect the measure of compensation. Accord, *United States* v. *93.970 Acres*, 360 U.S. 328, 332-333 (1959). This conclusion is all the clearer in the wake of Rule 71A of the Federal Rules of Civil Procedure, which regulates the practice and procedure in all eminent domain proceedings in federal courts, without regulating the measure of compensation.[15]

[15] When the Federal Power Act was passed in 1920, the Federal Rules of Civil Procedure had not been promulgated, and federal courts borrowed state practice and procedure. Moreover, federal courts were still applying federal common

The landowners argued below, and Judge Simpson in dissent agreed, that state law should be applied under the "choice of law" principles of *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). The argument is that, since the Act is silent on the measure of compensation and the United States is not a party to the proceeding, the lawmaking gap should be filled by reference to state law rather than "federal common law." The Fifth Circuit seemingly proceeded on the assumption that a choice of law was required under *Clearfield Trust*, and then balanced competing interests to conclude that the federal interests prevailed. While the decision is supportable on that basis, in our view the Federal Power Act reveals congressional intent clearly enough to require federal law to be applied.[16]

---

law under *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842), so that it would have been natural for Congress to assume that federal substantive law would govern section 21 proceedings (see Pet. App. 11a n.17).

[16] Admittedly, "the demarcation between 'statutory interpretation' or 'constitutional interpretation,' on the one hand, and judge-made law on the other, is not a sharp line. Statutory interpretation shades into judicial lawmaking on a spectrum, as specific evidence of legislative advertence to the issues at hand attenuates." P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 770 (2d ed. 1973). Still, the alternative to state law here is not "federal common law" in the sense that Congress has enacted no specifically applicable legislation. Rather, this is a case where Congress has conferred a federal power using the specific words—"eminent domain"—normally associated with the traditional power of the federal government to take land subject only to the well-known requirements of the Fifth Amendment.

b. Although we believe the decision below is correct, it may be thought to conflict with at least two brief passages in opinions of the Eighth and Fourth Circuits. A series of seven decisions of the federal district court for Nebraska reached the court of appeals in 1942 (Pet. App. 11a & n.18). One produced the opinion in *Central Nebraska Public Power and Irrigation Dist.* v. *Harrison*, 127 F.2d 588 (8th Cir. 1942). The court of appeals there stated (127 F.2d at 589), without discussion, that the requirement in Section 21 that the practice and procedure of the state courts be followed, including the state court measure of value for compensation purposes. It is not clear whether any part in those proceedings pressed the question whether federal law should apply. In any event, the court's rationale was put to rest in *United States* v. *Miller*, *supra*, 317 U.S. at 380. None of the other six decisions in the Eighth Circuit discussed the question whether state or federal law applied. Each simply applied Nebraska law.

The Fourth Circuit decision was *Oakland Club* v. *South Carolina Public Service Authority*, 30 F. Supp. 334 (D.S.C.), aff'd, 110 F.2d 84, 86 (4th Cir. 1940). The court there reasoned that if Congress had intended to create a federal power of eminent domain, it would have enacted a more complete statute than Section 21—one that set forth the procedure to be followed and the measure of compensation to be allowed. These omissions in Section 21 led the Fourth Circuit to conclude that Congress only intended that licensees

have the power to exercise state-created rights of eminent domain in either federal court or state court.

In view of the brief discussion of the issue in these decisions and the infrequency of its recurrence, we do not believe that the technical conflict with the present decision warrants review of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM ALSUP
Assistant to the Solicitor General

ROBERT R. NORDHAUS
General Counsel

HOWARD E. SHAPIRO
Solicitor
Federal Energy Regulatory Commission

JANUARY 1979

APPENDIX A

LAND COSTS FOR LICENSED HYDROELECTRIC PROJECTS [1]

Total Cost of Land [2]	Total Cost of Projects [2]	Cost of Land As Average % of Project Cost	Cost of Land As Median % of Project Cost	Total Acres of Pond Area	Cost Per Acre
FOR ALL PROJECTS BROUGHT ON LINE 1920-1976 [3]					
434,138	4,506,155	10%	6%	1,287,033	2212
FOR PROJECTS BROUGHT ON LINE 1968-1976 [4]					
103,526	1,433,767	9%	3%	1,060,715	5600
FOR PROJECTS BROUGHT ON LINE 1970-1976 [5]					
38,810	844,050	7.4%	3%	24,319	4257

[1] Taken from *Hydroelectric Plant Construction Cost and Annual Production Expenses 1978, Twentieth Annual Supplement*, May 31, 1978, U.S. Department of Energy, Energy Information Administration. Figures are for private, state and municipal projects.

[2] In $1000's.

[3] 253 projects.

[4] 19 projects.

[5] 9 projects.

APPENDIX B

5-E

In the Supreme Court of Georgia

Decided: November 22, 1978

33628. DEKALB COUNTY v. TRUSTEES, DECATUR LODGE NO. 1602, B.P.O. ELKS et al.

MARSHALL, Justice.

The present case is here on certiorari. It involves the award of attorney fees in a condemnation proceeding. A brief review of the development of the law in this area at the outset would be helpful:

In *White* v. *Ga. Power Co.*, 237 Ga. 341, 343 (227 SE2d 385) (1976), this court held that "the words 'just and adequate compensation' contained in our Constitution are to be interpreted by the judiciary to include attorney fees incurred by a condemnee or condemnees in an eminent domain case and are also to be interpreted to include all reasonable and necessary expenses of litigation incurred by such condemnees in eminent domain cases." A three-step procedure was established in *White* for awarding attorney fees and expenses of litigation: First, the factfinder must determine the fair market value of the property actually taken plus consequential damages to any of the condemnees' remaining property that is not taken. Second, the factfinder must determine

whether additional damages should be paid by the condemnor to the condemnee; and if the factfinder determines that additional damages should be paid, such as attorney fees and reasonable and necessary expenses of litigation, the factfinder must make its recommendation to the trial judge to this effect. Third, if such a recommendation is made, the trial judge must conduct an evidentiary hearing and then determine the amount of such recommended damages and award such amount to the condemnee.

White v. *Ga. Power*, supra, was reaffirmed in *Dept. of Transp.* v. *Doss*, 238 Ga. 480 (233 SE2d 144) (1977) and it was also held in that case that, implicitly, the award of attorney fees must be reasonable.

In *Dept. of Transp.* v. *Flint River Cotton Mills*, 238 Ga. 717 (235 SE2d 31) (1977), it was held, in accordance with Justice Ingram's concurrence in *White*, 237 Ga. at p. 351, that the purpose of awarding attorney fees and litigation expenses is to reimburse the condemnee for those expenses he must incur in order to obtain the fair market value of his property taken; therefore, in *Flint River Cotton Mills*, the award of attorney fees and expenses of litigation was reversed, since the factfinder had not awarded the condemnee any more for the property than the condemnor had offered.

In the present case, the condemnor offered the condemnee $717,300 for the property. The factfinder, a special master, awarded $844,123 and, in accordance with the procedure set out in *White*, recommended

that attorney fees be awarded. The condemnor presented evidence that based on the valuation of the condemnee's attorney's time at $50 to $100 per hour, a reasonable attorney-fee award would lie in the range of $5,000 to $7,500. (The condemnee's attorney stated in an affidavit submitted to the trial court that he had devoted approximately 50 hours to the case.) The trial court awarded $42,274 in attorney fees, which is one third of the difference between the condemnor's offer and the ultimate award. The Court of Appeals affirmed, holding that in the absence of guidelines from this court to be used in determining the amount of attorney fees awardable in condemnation cases, it would follow the rule that appellate courts are without authority to fix attorney fees (*Reserve Life Ins. Co.* v. *Gay*, 214 Ga. 2, 3 (102 SE2d 492) (1958)); therefore, the Court of Appeals held that it would affirm an attorney-fee award in a condemnation case if there is any evidence to support it, at least in the absence of clear proof that it is the result of bias or prejudice. We granted certiorari. *Held*:

The foregoing recitation of the development of the law in this area by this court illustrates the difficulties encountered when appellate courts attempt to legislate. Almost every appeal of eminent domain judgments which reaches this court raises new questions, most of which could have been answered initially by properly drawn legislation.

We have reached the conclusion that this court was in error in *White* v. *Ga. Power Co.*, 237 Ga. 341,

supra, when it held, "the words 'just and adequate compensation' contained in our Constitution are to be interpreted by the judiciary to include attorney fees incurred by a condemnee or condemnees in an eminent domain case and are also to be interpreted to include all reasonable and necessary expenses of litigation incurred by such condemnees in eminent domain cases."

We now overrule *White* and subsequent cases decided pursuant to its holdings. The reasons for this decision are set forth in the majority opinion in *Bowers* v. *Fulton County*, 227 Ga. 814 (183 SE2d 347) (1971) and Justice Hall's dissenting opinion in *Dept. of Transp.* v. *Doss*, 238 Ga. 480, supra.

We reiterate that the majority of this court does not oppose the award of attorney fees in eminent domain cases. We simply hold that a proper construction of our Constitution does not require such award, and we further hold that this is a matter for legislative determination by the General Assembly.

Judgment reversed. All the Justices concur, except Nichols, C. J., Undercofler, P. J., and Hill, J., who dissent.

UNDERCOFLER, Presiding Justice, dissenting.

It is not right; it is not fair; it is not due process; and it is not constitutional for the government, or a public utility, to take your land without fully compensating you. In this country, a basic freedom is the right to own and possess land. When you are forced to surrender it for the public good, you must be of-

fered its fair price. If you are forced to sue to obtain its fair price then you must also recover the reasonable costs, including attorney fees, of waging the battle; otherwise, you are not fully compensated and have been mistreated, however unintentionally. For example, if the State or utility offers you $10,000 for your land and a jury finds its real value to be $25,000 out of which you must pay your costs of litigation, including attorney fees, you have remaining a sum less than the real value of your land. Thus, you have been penalized for having to sue to enforce your right to be fully compensated by the government or utility whose expenses, including attorney fees, are paid by your taxes and your utility rates. The majority of this court holds to the contrary and I dissent.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 285375 284

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1866

PAUL BOSWELL, ET AL., *Petitioners*

v.

GEORGIA POWER COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONSE OF PETITIONERS TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Of Counsel: W. DAN GREER

HEYMAN AND SIZEMORE
1940 Equitable Building
Atlanta, Georgia 30303

Of Counsel: JAMES H. ROLLINS

COFER, BEAUCHAMP & HAWES
Suite 200
Peachtree & Broad Building
Atlanta, Georgia 30303

Of Counsel: GEORGE D. LAWRENCE, JR.

LAWRENCE, RICE & LAWRENCE
P. O. Box 89
Eatonton, Georgia 31024

Of Counsel: DENMARK GROOVER, JR.

GROOVER & CHILDS
P. O. Box 755
Macon, Georgia 31202

Attorneys for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

RESPONSE OF PETITIONERS 1

1. The United States Recognizes the Conflict Between the Decision of the Fifth Circuit Court of Appeals and the Decisions of the Eighth and Fourth Circuit Courts of Appeals 2

2. The Amicus has Failed to Address the Direct Conflict Between the Decision Below and the Choice of Law Principles Developed by this Court in *Bank of America* v. *Parnell*, 352 U.S. 29 (1956) and its Progeny 3

3. The Amicus' View that a Congressional Intent is Evidenced on the Face of Section 21 Conflicts with the Views of All Circuit Courts of Appeals Which Have Addressed the Issue 5

4. The Amicus' Empirical Data Upsets the Conclusions of the Majority Below 6

CONCLUSION 9

CASES:

Bank of America v. *Parnell*, 352 U.S. 29 (1956) 3
Central Nebraska Public Power and Irrigation District v. *Harrison*, 127 F.2d 588 (8th Cir. 1942) 5, 7
Georgia Power Company v. *148.577 Acres of Land*, Civil Action No. 892 (M.D. Ga., judgment entered January 24, 1952) 8
Grand River Dam Authority v. *Grand Hydro*, 335 U.S. 359 (1948) 3
King v. *Grand River Dam Authority*, 336 F.2d 682 (10th Cir. 1964) 7
Miree v. *DeKalb County*, 433 U.S. 25 (1977) 4, 7
Oakland Club v. *South Carolina Public Service Authority*, 110 F.2d 84 (4th Cir. 1940) 5, 7
United States v. *Yazell*, 382 U.S. 341 (1966) 4
Wallis v. *Pan American Petroleum Corp.*, 384 U.S. 63 (1966) 4

CONSTITUTION AND STATUTES:

United States Constitution, Fifth Amendment ... 6

Section 7(b), 16 U.S.C.A. § 800(b) (1974) 6

Federal Power Act,
Section 7(b), 16 U.S.C.A. § 800(b) (1974) 7

Section 14, 16 U.S.C.A. § 807 (1974) 7

Section 21, 16 U.S.C.A. § 814 (1974) 1, 2, 3, 5, 6, 8, 9

Mississippi River Flood Control Act,
33 U.S.C.A. § 702d (1970) 5, 6

Rivers and Harbors Act,
33 U.S.C.A. § 595 (1970) 5, 6

MISCELLANEOUS:

Hydroelectric Plant Construction Costs and Annual Production Expenses 1976, Twentieth Annual Supplement, May 31, 1978, U.S. Department of Energy, Energy Information Administration 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1866

PAUL BOSWELL, ET AL., *Petitioners*

v.

GEORGIA POWER COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONSE OF PETITIONERS TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This supplemental response addresses the Brief for the United States as Amicus Curiae (hereinafter the "Amicus Brief"), which takes a position adverse to that of the petitioners.[1] The petitioners have asserted

---

[1] It should be noted that the views expressed by the United States in the Amicus Brief do not seem to accord with its position in the court below. In the court of appeals, the United States filed a document entitled "Memorandum of Federal Power Commission as Amicus Curiae" in which the FPC declined the court of appeals' invitation to file an amicus brief addressed to the constitutionality of Section 21 of the Federal Power Act and noted: "*Nor does the Commission believe it necessary to file a brief addressed to the principal issue presented by this appeal:* Whether state law or federal law should apply to eminent domain proceedings conducted by

two major reasons for granting a writ of certiorari in this case: (1) the need for resolution of the conflict between the decision of the Fifth Circuit Court of Appeals here and earlier decisions of the Courts of Appeals of the Fourth, Eighth and Ninth Circuits, and (2) the pressing need to resolve the direct conflict between the decision below and the choice of law principles developed by this Court in *Bank of America* v. *Parnell,* 352 U.S. 29 (1956) and its progeny. The amicus concluded that the writ should be denied. However, petitioners submit that an analysis of the Amicus Brief, its ultimate conclusion notwithstanding, supports the necessity for review by this Court.

1. The United States Recognizes the Conflict Between the Decision of the Fifth Circuit Court of Appeals and the Decisions of the Eighth and Fourth Circuit Courts of Appeals.

By acknowledging the conflict of decisions between the circuits, the United States accords with the view of the landowners and rejects the view of Georgia Power. Amicus Brief, pp. 17-18. The amicus has attempted, however, to minimize the effect of this conflict between the circuits by asserting that, because of "the infrequency of its recurrence," this issue does not warrant review. Amicus Brief, p. 18.

The amicus' assertion of infrequent recurrence of this issue simply does not square with the facts and figures set forth in the earlier portion of the Amicus Brief, which describe the predicted frequency of future

federally licensed hydroelectric power companies pursuant to Section 21 of the Power Act." Memorandum of Federal Power Commission as Amicus Curiae, at p. 2 (emphasis added). The Federal Energy Regulatory Commission, the amicus curiae here, has now succeeded to the functions and responsibilities of the Federal Power Commission.

hydroelectric development by Commission licensees.[2] Rather, the very figures cited by the United States clearly indicate that the issue in this case will most certainly recur. Thus, this Court should grant certiorari to dispose of the issue it expressly left open in *Grand River Dam Authority* v. *Grand Hydro,* 335 U.S. 359, 373 (1948), and resolve the acknowledged conflict between the circuits on this issue.

2. The Amicus Has Failed to Address the Direct Conflict Between the Decision Below and the Choice of Law Principles Developed by This Court in *Bank of America* v. *Parnell,* 352 U.S. 29 (1956) and Its Progeny.

This Court invited the Solicitor General's views in this case to aid in determining whether the interests of the federal government here are so significant as to require the formulation and application of a federal common law under Section 21 of the Federal Power Act. Presumably, the United States could have specifically pointed out what, if any, of its substantial

[2] The United States notes, for example, that the federal rule concerning the set-off of benefits to the remainder is different from the rule in 36 states. Further, the United States points out that over 65% of the national hydroelectric generating capacity has not yet been developed; that historically about 45% of this capacity has been developed privately under Commission licenses; and that as of September 30, 1977, the FPC had 25 pending applications for preliminary permits. Amicus Brief, pp. 8-10. Thus, approximately 30% of all future hydroelectric development will be undertaken by licensees in states where there are substantial differences between state and federal rules of valuation. Additionally, since the decision below is the first reported decision squarely applying a federal common law in Section 21 condemnations, one can only assume that licensees in those 36 states where the state laws are more favorable to the landowner will now begin to invoke Section 21 and attempt to apply the federal rules here formulated to the exclusion of state eminent domain laws.

rights or duties would be subjected to "exceptional uncertainty" by the application of state law. *Miree* v. *DeKalb County,* 433 U.S. 25 (1977). Presumably, it could have specifically demonstrated the "significant conflict between some federal policy or interest and the use of state law." *Wallis* v. *Pan American Petroleum Corp.,* 384 U.S. 63 (1966). Presumably, it could have demonstrated how the federal program or interest to be protected by application of a federal common law must be "uniform in character throughout the nation." *United States* v. *Yazell,* 382 U.S. 341 (1966). The failure of the United States to squarely address these important questions is significant. The inability to demonstrate any exceptional uncertainty, significant conflict or need for uniformity implies a lack of overriding federal interests.

Instead of demonstrating an overriding federal interest, the most that the United States can say is that "in the light of the significant differences in land acquisition costs that *may* result from the choice between federal and state rules for measuring compensation, the choice of the legal standard is a *matter of concern* to the Commission in carrying out its licensing functions." Amicus Brief, p. 12 (emphasis added). This is hardly a statement of a "significant conflict" between federal policy and the use of Georgia law which has been required by this Court for the creation and application of a federal common law. *Miree* v. *DeKalb County,* 433 U.S. 25 (1977); *Wallis* v. *Pan American Petroleum Corp.,* 384 U.S. 63 (1966).

Instead of directly addressing the choice of law test, the amicus takes the anomalous position that this is not really a choice of law case, thus rejecting the basic

analytical approach taken by both the majority and dissent in the court of appeals and by the district court before that. Amicus Brief, p. 16. However, even if the decision of the court below is correct, but for the wrong reasons as the amicus argues, the precedential effect of the Fifth Circuit's newly devised "balancing test" demands a review of this novel approach to choice of law questions, an approach which will have widespread ramifications far beyond the scope of Section 21.

3. The Amicus' View That a Congressional Intent Is Evidenced on the Face of Section 21 Conflicts With the Views of All Circuit Courts of Appeals Which Have Addressed the Issue.

The amicus has asserted that a congressional intent to apply federal rules of valuation may somehow be perceived by an analysis of Section 21 itself and seems to conclude that the issue in this case should be decided on that basis. However, the courts of appeals for both the Fourth and Eighth Circuits have failed to perceive such an intent. *Central Nebraska Public Power and Irrigation District* v. *Harrison,* 127 F.2d 588 (8th Cir. 1942); *Oakland Club* v. *South Carolina Public Service Authority,* 110 F.2d 84, 86 (4th Cir. 1940). And in fact, both the majority and dissent in this case were unable to find any such Congressional direction "in either the language of Section 21 or its legislative history." Pet. App., pp. 7a, 30a-31a.[3]

[3] An historical overview of federal condemnation statutes would, in fact, strongly support an argument that the congressional intent was to use state laws. In certain laws Congress specifically provided that special benefits could offset the value of the land taken in determining just compensation. Rivers and Harbors Act, 33 U.S.C.A. § 595, (1970); Mississippi River Flood Control Act, 33 U.S.C.A. § 702d (1970). One might logically conclude that by failing specifically to so provide for this offset in Section 21 of the Federal Power Act, Congress evidenced an intent that such an offset not

This argument, like the argument of respondent Georgia Power Company, that the Fifth Amendment to the United States Constitution somehow requires the application of federal, rather than state, rules of valuation simply begs the choice of law question. The states are also subject to the Fifth Amendment and cannot take property for less than just compensation as set forth in the Fifth Amendment; the question here is not whether or not the Fifth Amendment applies, since it applies in every case. Rather, the question is whether state law will be chosen to fill the "statutory interstices" or whether some overriding federal interest requires the formulation and application of a federal common law of valuation under Section 21. Obviously, that question cannot be answered by mere reference to the face of the Federal Power Act itself or to the Constitution.

4. The Amicus' Empirical Data Upsets the Conclusions of the Majority Below.

The majority below found a necessity for implementing a federal common law primarily because of its determination that use of state law could interfere with Congressional aims (1) by increasing the costs of hydroelectric projects thereby placing a chill on development and causing higher utility rates, and (2) by failing to minimize the federal government's option

be allowed. This omission in Section 21 becomes all the more revealing when one realizes that the Rivers and Harbors Act became law in 1918, the Federal Power Act in 1920, and the Mississippi River Flood Control Act in 1928. Thus the non-specific Federal Power Act is straddled chronologically by statutes which specifically require the offset of benefits to the remainder against the value of the land taken.

price under Section 14 of the Federal Power Act. Pet. App., pp. 24a-26a. While it is recognized that these findings should be dealt with in the argument of the case on the merits, the empirical data offered by the amicus deserves comment with regard to its implications as to the finding below.

First, the United States recognizes that the minimization of the Section 14 option price is "a less important federal interest," because the likelihood of the exercise of the Section 14 option is factually remote. Amicus Brief, pp. 12-13.[4] The impact of this factual statement upon the decision of the court below cannot be overstated, because the Section 14 option was the only factor isolated in the balancing test below which could conceivably have had the "direct effect upon the United States or its Treasury" as required in *Miree* v. *DeKalb County*, 433 U.S. 25 (1977).

Secondly, in assessing the impact of the amicus' empirical data upon the majority's crucial determination below that the use of state laws would so increase the cost of hydroelectric projects as to chill development, one must keep in mind two very important points: (a) *many licensees have historically used state substantive measures to condemn property for hydroelectric projects,*[5] and a number of major hydroelectric projects

[4] This factual statement is not surprising since under Section 7(b) of the Federal Power Act, 16 U.S.C. § 800(b), the Commission may not issue a license where it has found that "the development of any water resources for public purposes should be undertaken by the United States itself."

[5] *King* v. *Grand River Dam Authority*, 336 F.2d 682 (10th Cir. 1964); *Central Nebraska Public Power and Irrigation District* v. *Harrison*, 127 F.2d 588 (8th Cir. 1942); *Oakland Club* v. *South Carolina Public Service Authority*, 110 F.2d 84, 86 (4th Cir. 1940).

have been developed by non-federal, non-licensees who did not even have access to federal courts[6]; and (b) the data presented by the amicus do not even suggest the extent of any increase in cost from application of state law or shed any light on whether that increase is significant enough to chill hydroelectric development.[7] Thus, the United States has essentially eliminated both elements of the supposed federal interest which the court below found to tip the scale in favor of application of a federal common law under Section 21. Pet. App., 23a-26a; see also Judge Simpson's dissent on the point at Pet. App. 41a-44a.

In fact, when condemning land for Lake Sinclair, the sister project to Lake Wallace, Georgia Power Company used state substantive rules of valuation. *Georgia Power Company* v. *148.577 Acres of Land*, Civil Action No. 892 (M.D. Ga., judgment entered January 24, 1952). And the absence of any other cases presenting this issue implies a widespread use of state laws by licensees, since the laws of 36 states are apparently distinguishable from the bare Fifth Amendment protections.

[6] Of the 311 non-federal plants for which detailed data was presented by the Department of Energy, only 245 are operated under FPC licenses. Thus, over 21% of the major non-federal hydroelectric plants are non-licensed projects owned by private, municipal or state entities. *Hydroelectric Plant Construction Cost and Annual Production Expenses 1976, Twentieth Annual Supplement*, May 31, 1978, U.S. Department of Energy, Energy Information Administration, page v.

[7] For example, "cost of land" as outlined in Appendix A of the Amicus Brief may include substantial sums not related to any rule of valuation, such as attorneys' fees, appraisals, and engineering costs; and it certainly includes the cost of significant amounts of land which would not be substantially affected by this decision because they were "total takings" and could not involve a set-off of benefits.

CONCLUSION

The courts of appeals have rendered conflicting decisions with respect to the question presented, upon which this Court has heretofore expressly reserved opinion. The issue is likely to frequently recur. In addition, the decision below develops a "balancing test" which ignores most of the choice of law principles developed by this Court. Finally, in implementing the "balancing test", the court below relied on crucial factual determinations which have been substantially discredited by the Amicus Brief. Because of the implication of the decision below on not only Section 21 condemnations but on all future choice of law questions in the federal courts, this Court should grant certiorari.

Respectfully submitted,

Of Counsel: W. DAN GREER

HEYMAN AND SIZEMORE
1940 Equitable Building
Atlanta, Georgia 30303

Of Counsel: JAMES H. ROLLINS

COFER, BEAUCHAMP & HAWES
Suite 200
Peachtree & Broad Building
Atlanta, Georgia 30303

Of Counsel: GEORGE D. LAWRENCE, JR.

LAWRENCE, RICE & LAWRENCE
P. O. Box 89
Eatonton, Georgia 31024

Of Counsel: DENMARK GROOVER, JR.

GROOVER & CHILDS
P. O. Box 755
Macon, Georgia 31202

Attorneys for Petitioners